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Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 228.

GEORGE A. OHL & COMPANY,
PETITIONER,
v.
A. L. SMITH IRON WORKS,
RESPONDENT.

No. 229.

SAME *v.* SAME.

BRIEF FOR RESPONDENT IN OPPOSITION TO WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

I.

BRIEF SUMMARY OF THE FACTS.

George A. Ohl & Company, a New Jersey corporation, petitioner in each case, commenced suit against The A. L. Smith Iron Works, a Massachusetts corporation, respondent in each case, by writ issued from the United States District Court for the District of Massachusetts dated November 17, 1927. The A. L. Smith Iron Works, respondent in each case, commenced suit against George A. Ohl & Company by writ issued from said Court dated December 7, 1927. Declarations and answers were duly filed in each action, and the cases were tried together to a jury at the bar of said Court.

The suit instituted by George A. Ohl & Company will, for convenience, be referred to hereafter as the Ohl suit, distinguishing it from the cause of action sued upon by The A. L. Smith Iron Works, which will be referred to hereafter as the Smith suit. In the Ohl suit the jury returned a verdict for the defendant on May 7, 1929. In the Smith suit the jury, on said date, returned a verdict for the plaintiff and assessed damages in the sum of seventy-five hundred dollars ($7500). The Ohl Company filed a motion for new trial in each case on May 9, 1929, which motions were overruled on May 14, 1930.

On August 8, 1930, a writing, entitled "Substitute Bill of Exceptions on behalf of George A. Ohl & Company," was filed, and this writing contains a notation thereon, "allowed August 20, 1930. J.A.L. D.J."

On May 21, 1930, a writing was filed in the Ohl suit, entitled "Plaintiff's Bill of Exceptions concerning plaintiff's motion for new trial," and this writing contains a notation, "allowed August 20, 1930, J.A.L. D.J."

On May 21, 1930, a writing was filed in the Smith suit, entitled "Defendant's Bill of Exceptions concerning Defendant's motion for new trial," similar to that filed in the Ohl suit, differing only in that the word "defendant" was inserted in place of "plaintiff," and bearing a notation, "allowed August 20, 1930, J.A.L. D.J.," to wit, identical with that set forth in the case in which George A. Ohl & Company was plaintiff.

On September 8, 1930, judgments were entered for the defendant The A. L. Smith Iron Works in the action commenced against it by George A. Ohl & Company and for the plaintiff The A. L. Smith Iron Works in the action commenced by it against George A. Ohl & Company in the sum of seventy-five hundred dollars ($7500) damages, with interest and costs.

In the case of the Ohl suit the plaintiff's declaration contained twelve counts, in each of which recovery was sought

upon a promissory note made by the defendant to the plaintiff as payee.

The defendant The A. L. Smith Iron Works answered, pleading as to each count a general denial, lack of consideration, and failure of consideration. In the case of The A. L. Smith Iron Works against George A. Ohl & Company the declaration set forth that the plaintiff made an agreement with the defendant for the purchase of a machine for use in its factory, where the plaintiff was engaged in the business of manufacturing and installing architectural, ornamental, and structural steel; and manufacturing and installing ironwork; and that the machine delivered was defective, and not in accord with what the defendant had agreed to furnish the plaintiff. The machine was described, and its defects and failures set forth. The defendant George A. Ohl & Company's answer consisted of a general denial and a further answer to the effect that the material called for by the contract was tested, examined, and accepted as conforming to the contract by The A. L. Smith Iron Works prior to physical delivery.

On May 19, 1928, George A. Ohl & Company filed two motions for specifications. In the Ohl suit it moved that The A. L. Smith Iron Works specify in what way there was a failure of consideration. In the Smith case it moved that The A. L. Smith Iron Works specify in answer to certain questions. The Smith Company, as plaintiff, filed specifications, and the parties agreed that such specifications be considered as specifications under Smith's answer in the Ohl suit.

George A. Ohl & Company, hereafter for the sake of convenience referred to as Ohl Company, is a New Jersey corporation engaged in manufacturing different kinds of machines for stamping, rolling, and cutting sheet-metal products from the thinner material up to half-inch thick and from 3 feet long to 12 feet 6 inches long.

The A. L. Smith Iron Works, hereafter for the sake of convenience referred to as Smith Company, has been in

business over thirty years in the City of Chelsea in the Commonwealth of Massachusetts. This Company is engaged in structural steel and ornamental iron business, and at times in special work, buying the raw material in lengths for structural and in bars or sheets for ornamental purposes. It has a plant where the raw material is fabricated. The work performed at the plant is done by machine as much as possible and there is a constant effort to diminish the amount of work done by hand, due to the expense of that type of work. The Smith Company, as the larger part of its business, fabricates and installs stair stringers, stair treads, and stair risers, principally in the larger buildings being erected in the vicinity of Boston. This type of work, as is commonly known, is constructed according to specifications and architectural drawings indicating the precise type of material, method of construction, and detail of construction that is required. Among the matters commonly so prescribed are the dimensions of such materials, the incline of the stairway in question, and other factors necessitating the construction of metal; so that in its installation it becomes a part of the other metal work in such building. These circumstances require the metal work made and installed by the Smith Company to have and retain a certain fixed angle and the material as furnished must retain that angle. Stair stringers are always bent to a predetermined angle, usually 90 degrees, which such stairs must retain.

The machine the subject-matter of this litigation was purchased to form stair stringers, treads, and risers for the Smith Company. The structural steel plates used by the Smith Company in connection with that type of work herein described were purchased under thickness or gauged specifications, usually rated from $\frac{3}{8}$ inches in thickness to lesser thicknesses. All the facts alleged with respect to the business of the Smith Company and the type of work that it was expected that said machine would do and for which it was

purchased were well known to the Ohl Company long prior to the consummation of the contract sued upon.

The machine in question is a ponderous one, weighing in excess of 108,000 pounds, measuring 12 feet 6 inches in length and over 10 feet in height. Its installation in the plant of the Smith Company required the laying of a substantial foundation, a rearrangement of the plant of said Company, and was attended with considerable expense.

Mr. Smith informed Mr. Ohl about the respondent's need of a machine to form steel some two or three months before the machine was ordered and of Smith's desire to secure a machine to form stair material in one operation (R. p. 19). Smith told Ohl that he wanted a 12'6" press and that he had never had any experience in making machines, but that he wanted a machine strong enough to bend ⅜" plate (R. p. 53). A week or two later Smith again saw Ohl and Ohl told him that, if the machine did not bend ⅜" material, Smith could have the machine for nothing (R. p. 17).

On November 24, 1925, Smith wrote Ohl placing an order for a 12'6" power press of ⅜" capacity (Exhibit B). By letter of January 12, 1926, Smith requested Ohl to manufacture a set of dies to form material at 90 degrees, the full length of the machine, for use upon such machine (R. p. 20).

On February 2, 1926, the Ohl Company informed Smith that the press would be ready in about two weeks (Exhibit S). On February 19, 1926, Smith and Mr. Hovasse, a mechanic in the employ of the Smith Company, went to the Ohl factory, where a riser and tread of ⅛" thickness was made, about 5 feet long (R. pp. 58-60). Mr. Smith left Mr. Hovasse at the plant, and the latter asked that a piece of ⅜" steel be bent. No one piece 12 feet 6 inches in length of ⅜" steel was bent. Three pieces bent at the same time averaged about 4 feet each, and were bent in one operation, but not of ⅜" steel. The Ohl Company did not have a ⅜" steel, and they finally made a piece by plating on one side to bring thickness (R. p. 59). The type of steel used that was bent in this oper-

ation was coppered-back steel, and not the kind of steel used for stringers, but Hovasse did not notice that fact nor was it called to his attention (R. p. 82). On February 25, 1926, Ohl had Hovasse sign an acknowledgment (Exhibit RR) that he had tested the machine and that everything was found satisfactory (R. p. 60). This is the writing that is referred to by the Ohl Company in its answer in the Smith suit as an acknowledgment of performance.

On March 3, 1926, Ohl wrote to Smith (Exhibit W) notifying Smith of shipment of the machine and saying that he had tested out the press *thoroughly* (italics ours) before shipment and felt confident that Smith would be well pleased with it. A memorandum of agreement (Exhibit A) dated March 1, 1926, was sent to Smith for signature, and was signed with a rider attached, as follows (R. p. 11):

> "Newark, New Jersey,
> March 9, 1926.
>
> We hereby guarantee that the 12'6"-103,000 pounds power press has a capacity as stated in our specifications of said Press, namely, 3/8" soft steel on steel dies, the female of which measures 3" across the corners, and that the material and workmanship are of the best.
>
> GEORGE A. OHL CO."

These specifications were somewhat lengthy, and among other provisions contained the following (R. pp. 48-51):

> "This machine has been built to meet the demand for a machine which will bend the heavier gauges of metal with ease and you can also *bring out in fine detail, multiple bends which cannot be successfully accomplished in the lighter machines of this class.* . . . [Italics ours.]
>
> "The main or eccentric shaft 8" in diameter, is a high carbon steel forging, and is driven at both ends by large cut gears, thus preventing all twist of the machine under the heaviest strains and adding greatly to the

smooth operation when worked to its fullest capacity. . . .

"This power adjusting motion is protected by our patented friction frog gear marked 'B' on enclosed blueprint, which is adjusted that it will just lift the weight of the slide or hammer, and if the operator adjusts the slide down hard on the dies or up to the extreme limit, this gear will slip and no damage will be caused. . . .

"The main driving clutch is 25" in diameter with its clutch cheeks fitted with hardwood inserts, so that it will not 'cut' and at the same time carry the full capacity of the machine without slipping. . . .

"The bed or bottom piece also has a very heavy rib at the bottom and truss ribs are also provided, guaranteeing a construction which will not spring under the heaviest pressure it is subjected to. . . ."

The machine was set up in the plant of Smith Company and representatives of the Ohl Company admitted that the foundation and the machine were properly installed (R. p. 173). The press was first operated by the respondent on or about April 15, 1926, and rendered unsatisfactory service from the outset.

On June 25, 1926, the Smith Company wrote to the Ohl Company (Exhibit CC, R. p. 30) complaining about the machine and ascribing the trouble to the "fly-wheel bearing and disc getting hot." This letter inaccurately fixed the site of the trouble, although written in good faith. Ohl understood, however, that the real location of the trouble referred to was the "fly wheel shaft" (R. pp. 82-83, and Exhibit DD, p. 31).

Up to that time the Smith Company had not tried any 3/8" steel bending or forming in the machine, and the trouble experienced up to that time had resulted from work on lighter material. Ohl, on June 28, 1926 (Exhibit DD), simply told Smith to keep the machine oiled.

On August 13, 1926, Smith wrote to Ohl (Exhibit EE) that the machine would not perform in accordance with the specifications and the guaranty made by Ohl, and informed Ohl that what Smith wanted was a workable machine to facilitate production, and not controversy.

On August 16, 1926 (Exhibit FF), Ohl wrote to Smith telling Smith to have the machinist take off the fly-wheel, clean out the dirt, and lubricate with a good machinery oil.

On August 20, 1926 (Exhibit HH), Ohl wrote to Smith that the Boston Engineering Company reported that there was a "play in the shaft caused by the thrust rim being worn which part has to be renewed."

On August 23, 1926, Mr. Witte, counsel for Smith Company, wrote Mr. Ohl's counsel, Mr. Shannon (Exhibit II), informing him that the machine would not bend 3/8" metal without a material deflection, so that when Smith succeeded in bending a given piece of 3/8" it required a lot of man power after each operation to recover the metal from deflection. A suggestion was made in this letter that such changes be made in the machine as would be deemed essential to its proper operation in accordance with the agreement between the parties.

On August 25, 1926, Mr. Hovasse sent Ohl (Exhibit JJ) a letter informing him that he found that the 16" bushing "in housing number 2 was a poor, loose fit and turned around. The one brass roller retainer was broken in three pieces, with only two screws in the other, etc." He also informed Ohl that the machine would be down on the following Thursday and Friday while repairs were being made, and suggested that a man be sent by Ohl to see the machine, since "seeing is believing" (R. p. 38).

On August 26, 1926, Ohl wrote to Smith (Exhibit KK) again reiterating that any faults in the machine were due to improper oiling or lack of proper foundation under the press.

On August 28, 1926, Ohl sent to Mr. Witte, counsel for Smith, a letter (Exhibit LL) informing Mr. Witte in substance that any fault of the machine was due to improper operation by Smith, and that Ohl did not propose to furnish brains or keep the press in repair.

On September 3, 1926, M. Witte wrote to Ohl that, despite the tone of Ohl's letter, Ohl might have the opportunity of putting the machine in the condition which would approximate the warranty of Ohl (Exhibit MM, R. p. 40).

On September 8, 1926, Ohl wrote to Mr. Witte (Exhibit NN) informing him that there was no press in the world which would not deflect, and that Ohl did not believe that he knew the first thing about the trouble, and would go the limit against him (R. p. 41).

On September 14, 1926, Ohl wrote to Smith (Exhibit OO) informing Smith that other customers of Ohl were not complaining about their machines and that Smith did "not have a leg to stand on" (R. p. 42).

The Ohl Company contended in its correspondence and throughout the trial there was nothing wrong with the press sold by it to the Smith Company and that the materials and workmanship were of the best, and that any defects found by the Smith Company in the operation of the machine were due to negligent and improper operation by the Smith Company. Smith, on the other hand, contended that the machine could not do the work that Ohl agreed it would do, and that the machine, in its practical operation, was defective and not in accordance either with the specifications and guaranty of Ohl, or with the understanding of the parties as to the type of machine needed by Smith and which Ohl agreed to furnish, nor would it turn out proper products.

Smith testified as to the type of business conducted by The Smith Iron Works. Smith told Ohl how he wanted the work done so as to save cost and how the Smith plant did the work prior to that time. Ohl undertook to tell Smith that he could build a machine or anything Smith wanted, and that

Smith could rely upon his skill and ability. Smith informed Ohl that he wanted a machine that would bend material without getting it out of shape, in accordance with his specifications, up to ⅜", 12 feet long, and Smith understood that he was to get something suitable for the work that he described to Ohl (R. pp. 15-17; 145 *et seq.*).

Charles J. Hovasse, a master mechanic, testified that Smith started to operate the machine on April 15, 1926, and had trouble from the start in that the 16" bearing had turned around in the housing though the bearing was not supposed to revolve. The witness's testimony is that he put the bearings back with sufficient screws so that they would not turn loose again, but even after that the machine gave trouble and had to be shut down several times a day to cool off (R. p. 62).

On August 19, 1926, the Boston Engineering Company started to take part of the machine down, and some time after the Boston Engineering Company returned the material taken, Mr. Hovasse found a big blow hole in the casting where the 16" bushing goes in. Later, there was some complaint that the clutch that raised and lowered the hammers for adjustment on the machine gave a lot of trouble (R. p. 63), and that the material worked on the machine was bowed in such a way as not to be a commercial job, and required that the material worked in the machine be hammered or peened by hand to make it straight, peening meaning a continuous hammering at short spaces (R. p. 64). According to the witness, this bowing was due to the sinking or sagging of the center of the bed of the machine which he had noticed down at Newark and which he had been told by Ohl was due to the temporary support in the Ohl plant.

When Mr. Kolarsy, a representative of Ohl, came to the Smith plant, on September 1, 1926, he was shown the machine by Mr. Hovasse and informed of its defects. Mr. Kolarsy admitted that the machine was set up properly in the Smith plant and he made no suggestion that the machine had been improperly oiled. After Kolarsy's visit, Professor

Townsend and Professor Swett came to the plant and made observations concerning the machine. While they were there, a piece of 3/16″ material was bent. A 90-degree die, 12 feet long, was being used, and the bed of the machine bent down 65/1000 of an inch. The professors wanted to take a new reading, so Hovasse instructed the operator to make another bend. He did so, and the machine broke on the right-hand housing at two places in the housing or stanchion (R. p. 67) (Exhibit BBB, Photo). After the stanchion broke, it was repaired by making steel yokes over the top and putting in large 3″ bolts to hold it together (R. p. 68) (Exhibit TT, Photo). Other repairs were necessary to a firm holding. Because of the repairs some 18 inches in the usable length of the machine were lost, and the bars used to repair it narrowed the housing (R. p. 68).

The correspondence between the parties with respect to the alleged defects and insufficiencies of the machine was introduced in evidence without objection. Some of this correspondence was introduced by Ohl and some by Smith.

Other witnesses corroborated the testimony of Mr. Hovasse in regard to the deflection in the bed of the machine and the existence of the bowing as well as in regard to the unworkmanlike qualities of the machine (Robert Dunlop, R. p. 84; John E. Carron, R. p. 85).

Arthur L. Townsend, a professor at the Massachusetts Institute of Technology, testified that the machine did not have the capacity and could not perform the quality of work called for by the rider attached to the express warranty. He testified that the factor of safety in this machine was about 2½, which was "altogether too low in machines of this general type, which should run from 6 to 10 or 12 with 7 as a fair average" (R. p. 95). He also testified that in machines such as this, commonly sold in the market, there were safety devices, and that there was no safety device in this machine, and that the machine was not properly constructed, because of the absence of an efficient safety device (R. pp. 96-97). He

said the bowing existing in the machine was "very unworkmanlike and a very unreasonable amount of bowing" (R. p. 96).

Fred Perkins, a manufacturer of power presses, in business thirty-five years with the Perkins Machine Company, at Warren, Massachusetts, testified that the factor of safety in that machine was not sufficient to bend ⅜" steel without danger of eruption, nor was it capable of bending even as much as ¼" steel (R. p. 114). He also testified that the machine was of poor material and of poor construction (R. p. 114), and the efficiency of the machine was greatly reduced by the fact that the base was not given sufficient material, and that there was a large hole in the center of the bed which greatly weakened the cross-section; also an oblong hole in the center of the base, which did not appear in the prints (Exhibit 14, R. p. 116). It also appeared from his testimony that the machine was not properly designed to have a common factor of safety (R. p. 122).

J. F. Dailey, who was the first witness for the Ohl Company, testified that he was an attorney and went down to the Smith plant as an investigator. He said that he did not give his name, address, or business, but lied, and said that he wanted a sample piece of track. He testified as to a conversation that Mr. Simpson, an employee at the Smith plant, had with another employee, and then admitted that he did not know that he heard that conversation, and the Court struck out all his testimony as to what Simpson said (R. pp. 123, 124).

The Ohl Company called various other witnesses in an attempt to contradict the testimony offered by the Smith Company. Among them was George A. Ohl, president, treasurer, and sole stockholder of the Ohl Company. He testified as to conversations he had with Mr. Smith relative to the ordering of the machine, and described the machine (R. p. 147). On cross-examination he testified that his clutch was the safety device (R. p. 149); that he understood that Mr.

Smith never intended to use the machine for more than ¼" metal in bending (R. p. 160), and did not say anything to Hovasse about the copper plate on the ⅜" material that was used for a test in the plant at Newark (R. p. 163). The witness testified further that he had furnished his counsel with notes at the cross-examination of Hovasse with respect to the foundation which Hovasse constructed for the Smith machine; that there was no claim now that the foundation constructed by Hovasse for the machine in question was improper (R. p. 173). He also testified that the machine was not built strong enough to set ⅜" material (R. p. 184). On recross-examination he testified, in respect to Exhibit RRR, the United States Army Ordinance Department material specifications, June, 1924, that for heavy castings the tensile strength minimum is 30,000 pounds per square inch, and that he did not have a test made of the strength of the casting used in the machine in question (R. p. 206). Harold C. Mann, called by Smith in rebuttal, testified that he was a research engineer for the Watertown Arsenal of the United States Government, and tested specimens of the machine, which test revealed that one specimen had 25,600 and the other 26,800 pounds per square inch tensile strength, and that these specimens came from the outside of the machine, and that he "wouldn't want to figure that much over 20,000 to 22,000 for a general average" (R. p. 209). He also testified that the specifications of the Government are not considerably higher than those in the cast-iron trade, and that the specifications were patterned after the trade presses and very closely to the latest A.S.T.M., the American Society for Testing Materials (R. p. 210).

II.

Issues before the Trial Court.

One of the clear-cut issues between the parties was whether or not the machine in question deflected unduly,

causing bowing. To illustrate: If a 12′ piece of material were inserted in the press and the press operated, the work, upon examination, would show that it was out of alignment and the center had sagged. This material was spoken of, at the trial, as bowed material. This bowing was due to the depression of the press in that area upon which the middle of the material rested, and this malperformance of the press was spoken of as deflection. This alleged vice was specified by the Smith Company in the latter's specifications under paragraph 3 (*d*) and paragraph 4 of said specifications (R. pp. 8-9), paragraphs 5, 6 (R. p. 9), paragraphs 11 (*b*), 11 (*c*), 11 (*d*) (R. p. 10).

The claim of the Smith Company from the time that the deflection became observable was a consistent one, namely, that the bowing or deflection was so marked that hand labor had to be performed in peening the metal in order to conform it to the proper shape. In short, the respondent contended that the material formed in the Ohl machine was not then in merchantable form, and the bowing had to be corrected by hand labor. In support of this claim, in addition to the testimony of Smith and Hovasse, Professor Townsend also testified categorically without objection that in his opinion such result was very "unworkmanlike" (R. p. 97).

The petitioner's attitude with respect to this unsatisfactory performance of the press varied during the period under review.

Ohl first asserted that "there was no press in the world" which would not deflect (Exhibit NN, R. p. 41). Ohl's counsel implied by his examination of Hovasse that the deflection was caused by the faulty foundation constructed by the Smith Company upon which to place the press in question. Ohl admitted that the press deflected at his plant, but ascribed it to the temporary foundation upon which the press was placed at the Ohl plant. Ohl then in his testimony affirmed that there was not any deflection in his machine when it was shipped (R. p. 8) (R. p. 154).

In Ohl's cross-examination he admitted that he had inspired the cross-examination of Hovasse wherein it was attempted to elicit from the latter evidence of faulty foundation to account for deflection, but Ohl then abandoned the claim that the foundation constructed by the Smith Company was improper in any respect (R. p. 173).

Finally, Ohl took the position that there was always some bowing of material bent in the middle (R. p. 184).

The pieces of material that had indisputably been formed upon the Ohl press were produced in court and marked as exhibits and showed marks of peening necessarily performed to correct bowing. Peening, as used at the trial, referred to manually hammering the material for the purpose of curing improper alignment (R. p. 184).

Bowing has no relation to the angle at which material is bent, but has to do with the lack of alignment of material after the bending process has been completed. The crude material used in the press in question when inserted is unbent, but is in alignment, and the machine contracted for was one which would bend it properly without creating any lack of alignment.

Finally, therefore, as the parties were left, it was admitted that there was bowing caused by deflection of the machine which the Ohl Company said did not impair its merchantable qualities nor constitute an unworkmanlike job, nor impose upon the Smith Company any burden of correction; while the Smith Company asserted in each respect the contrary. This issue was submitted to the jury in this succinct manner: "Would this machine bend the iron in a proper way to turn out merchantable stair treads, risers and stringers" (R. p. 219).

Another major issue in the case was whether or not this machine formed material in a workmanlike manner, as it was warranted to form. The machine was designed and purchased to bend a flat sheet of steel at a predetermined angle upon dies. The only angle contemplated by the parties was

a right angle, as shown by the fact that the measurements of the angle are controlled by the dies, which were all right-angle dies, and as shown by the testimony of the superintendent of the petitioner (R. p. 141). The stair stringers were to be formed for erection upon ironwork in large buildings in Boston and vicinity. This was a matter of common knowledge, and was not disputed. Obviously any variance from 90 degrees in a given stringer would make it impossible for the employment of that stringer in the construction of stairs. If the bending process could not produce a sharp-cornered 90-degree angle, the product could not be used as stairs or stringers. Commercially this operation of so forming metal is known as "bending." It was a claim of the Smith Company that the machine in question would not sufficiently compress material as to leave it bent 90 degrees. There was evidence that in bending the metal it was apt to "spring," so that sufficient force must be exerted in bending metal to the desired angle to eliminate this "spring."

Ohl finally took the position that his press would not form the material; that it was not built strong enough to set ⅜" material (R. pp. 48 and 184).

In other words, petitioner contended that all the machine was required to do was to bend metal ⅜" thick or less irrespective of the extent of the bend or shape of the product after the bending process. But his superintendent in the course of his testimony definitely showed that "forming" the metal to a 90-degree angle or to the desired shape was the ultimate object of the bending process (R. p. 141).

Another major issue of fact related to whether or not the machine in question had a proper safety device. The Smith Company contended that there was too low a safety factor and that the machine had no safety device. It appeared from the testimony of Professor Townsend that machines similar to that sold, when marketed, had safety devices (R. p. 96); that friction clutches were not satisfactory as safety devices (R. p. 97); and that the particular machine as con-

structed without a safety device was not of proper construction (R. p. 97). It was the early contention of the Ohl Company that there was no requirement that the machine in question should have a safety device. It appeared, however, that in the Ohl specifications there was reference to a "patented friction frog gear" that was so adjusted that, if a maladjustment was made, a gear would slip and no damage would be caused (R. p. 48). Ohl testified that certain directions were given to purchasers for setting up his presses (Exhibit X), and that, anticipating maladjustments, certain information was imparted for correcting a stalling of the machine (R. p. 156). Ohl testified as follows: His clutch was the safety device (R. p. 148). The machine would not be a proper machine if it had a claw clutch or open clutch or any positive clutch. "XQ. 49. And if it did not have some safety device, in this case a peculiarly, adapted clutch, it would not be a proper machine? A. Yes just the same" (R. p. 158). Again Ohl testified that the 25" diameter friction clutch is a safety device, the best known in mechanics among positive clutches (R. p. 148).

Thus the parties were in agreement that a safety device was a necessary part of the machine, and, in effect, that this machine was not equipped with such a device, although Ohl also contended that his friction clutch constituted a safety device. In other words, as the judge says: "Whether a safety device of some kind was necessary and whether this clutch amounted to a safety device in that it would slip if it was properly adjusted" (R. pp. 218-219).

Another main issue between the parties was whether or not, because of the lack of safety device, and other infirmities, the machine in question broke. At the time the machine broke it was being employed to bend material imposing on it less stress than its warranted capacity (R. pp. 93-94). Therefore it was not improper operation that caused the break. Nor could the break be ascribed to the failure properly to operate what Ohl alleged to be his safety device, the

clutch. Ohl conceded that the break was not due to any failure to adjust the clutch, it being set with such precautions as Ohl said were sufficient. The clutch was adjusted by the "trial and error" method. Carron, the Smith Company's operator, so testified (R. p. 85), and Ohl testified likewise (R. p. 149). (See also R. pp. 164-169.) Or, as the judge said to the jury: "It is for you to say whether it broke under a fair trial or whether at the time that it broke it had an improper load put on it or whether the machine was operating improperly" (R. p. 219).

The Smith Company presented irrefutable testimony that, because of its peculiar construction, the machine was incapable of withstanding the stress imposed upon it at the time of the break.

There were many other imperfections in the machine in question claimed by the Smith Company which were made the subject of complaint by them and are referred to in the specifications of the Smith Company. So far as these troubles were concerned, the parties were not in dispute that they had occurred. A careful check-up by the Ohl Company showed that they existed, and moreover the correspondence of Mr. Ohl affirmed their existence. In these matters the sole dispute was this: Whether, as the Ohl Company asserted, the troubles were due to failure to properly lubricate or not. There was affirmative, convincing proof by way of testimony produced by the Smith Company that lubrication had been carefully attended to. The contentions of the Ohl Company were summarily disposed of by an expert who examined the machine for them with a view to clear up one of the causes of trouble. The Boston Engineering Company was employed by counsel for the Ohl Company to examine the machine in question at the request of the Ohl Company (R. pp. 92-93). In consequence of this employment an expert machinist of the Boston Engineering Company went to the Smith Company plant and dismantled the clutch assembly. He testified that he found it "well lubricated" and that "There were a lot of flaws in it" (R. p. 84).

It is undisputed that no attempt was made to bend the heavier stock until after the Boston Engineering Company restored the clutch late in August, 1926 (R. pp. 88, 92); that there are seasons for the formation of the various thicknesses and their uses as stairs, treads, and stringers (R. p. 63).

A defense specially pleaded was that there had been an acceptance by the Smith Company of the machine in question as "a proper delivery in satisfaction of the defendant's obligation prior to the physical delivery thereof by the defendant to the plaintiff." The incident referred to occurred when a mechanic employed by the Smith Company was presented at the Ohl plant to receive instructions as to the manner of operating the machine in question. He was not there for any other purpose. At that time, as Ohl admitted, the machine was never operated upon a 12'6" piece of material; nor was it operated upon a ⅜" thick steel sheet; nor was it operated on the prescribed dies; nor was it operated on a permanent foundation. Admittedly, at that operation the machine was not being subjected to the stresses which would be imposed by the extreme warranted performance (R. p. 163).

III.

Steps in the Proceedings from the Commencement of the Actions to the Confirmation of Judgment by the Circuit Court of Appeals.

The original writs in the cross-actions between these parties were brought in the latter part of 1927 (R. p. 229).

The action by the Ohl Company (petitioner) was based on a series of notes representing the balance of the purchase price of a machine which it had sold to the Smith Works (respondent) (R. pp. 1-2).

The action by the respondent was based on breaches of warranty, express and implied, under which said machine was sold (R. pp. 230-233).

The answer to the action on the notes was a general denial, lack of consideration, and failure of consideration (R. p. 3).

The answer to the action on the breaches of warranty was a general denial and acceptance of the machine (R. p. 233).

The respondent, in compliance with the requests of the petitioner, filed certain specifications of defects in and failures of the machine to function as the parties intended it should (R. pp. 8-11, 233-235).

The actions were tried together before a jury in April and May of 1929, and the trial consumed about three weeks (R. p. 4).

In the action by the petitioner the jury returned a verdict for the respondent. In the action by the respondent the jury returned a verdict for the respondent in the sum of $7500. These verdicts were returned on May 7, 1929 (R. pp. 5, 236).

On May 9, 1929, the petitioner filed a motion for a new trial in each case.

In the action brought by the petitioner the motion was specifically confined to certain alleged misconduct of one or more of the jurors and to "the verdict as it concerned the defendant's damage" (R. pp. 5, 206, top).

In the action brought by the respondent the petitioner's motion was confined to the same grounds except that the word "plaintiff" was substituted for the word "defendant" (R. pp. 236-237).

These causes were thence continued from term to term to the March term, 1930, *i.e.*, May 14, 1930, on which date they were set down for hearing and overruled (R. pp. 6, 237).

On August 8, 1930, a writing was filed entitled "Substitute Bill of Exceptions on Behalf of George A. Ohl & Company," and this writing contains the notation: "Allowed August 20, 1930, J.A.L. D.J." This paper was expressly made applicable to both cross-actions, and so treated (R. pp. 7, 238).

Near the bottom of page 2 of the petition for certiorari it states that "the trial judge, in counsel's presence, examined the bills and orally allowed them." If material, the respondent points out that this statement does not apply to respondent's counsel; since the filing of its petition the petitioner addressed a communication to the clerk of this Court disclaiming any inference that the respondent's counsel was present on that occasion.

On September 8, 1930, judgments were entered as follows: For the respondent in the action by the petitioner; and for the respondent in the sum of $7500 in its action against the petitioner (R. p. 238).

Petitions for appeal were filed and allowed November 25, 1930 (R. pp. 227, 239).

The clerk of the District Court certified the appeals on January 22, 1931 (R. p. 263).

The cases came on to be argued before the Circuit Court of Appeals on October 22 and 23 of 1931 (R. p. 263).

On March 22, 1932, the Circuit Court of Appeals rendered its opinion affirming the judgments of the District Court, with interest and costs (R. p. 269).

IV.

Issues before the Circuit Court of Appeals.

(1) The respondent's motion to expunge the so-called bills of exceptions for that—

a. they were not properly authenticated;

b. they failed to incorporate all of the material evidence;

c. the statement therein that they contained all the material evidence was inconsistent with other portions of the transcript (R. pp. 11, 224-226).

(2) Assignments of error during the trial.

V.

Steps from the Circuit Court to the Supreme Court of the United States.

In the October term, 1932, the petitioner filed in this Court a petition for a writ of certiorari and on October 17, 1932, said petition was granted.

While the transcript of record filed with the petition for the writ of certiorari contained the petitioner's petition for rehearing addressed to the Circuit Court of Appeals, it appears to be omitted from the record prepared by the clerk of this Court, presumably with the approval of this Court.

VI.

Issues before the United States Supreme Court.

In its present brief, at page 1, the petitioner divides its arguments under two general heads, *i.e.:*

a. "The technical questions of the allowance of the bills of exceptions."

b. "The merits of the exceptions."

The respondent submits that, in view of the fact that the Circuit Court of Appeals has confined its stated grounds for the affirmation of the judgments to the lack of proper bills of exceptions and to its refusal to permit any amendment of them, the original assignments of error and all papers filed by the respondent after the opinion and mandate of the Circuit Court of Appeals were properly omitted from the record before this Court and are therefore irrelevant to the true issues now before the Court.

However, out of abundance of caution, the respondent will discuss all issues now raised by the petitioner, subject, however, to certain inaccuracies in the petitioner's brief and other papers filed by it which will be pointed out under appropriate captions.

VII.

Inaccuracies in the Petitioner's Brief.

1. At page 1 the petitioner states: "The bills were assented to." The fact is that the bills were amended after the respondent assented to them, and that the amendment was not assented to (R. p. 6). See also petitioner's unqualified admission of this fact at page 19 of its petition for rehearing addressed to the Circuit Court of Appeals and annexed to the transcript of record accompanying its petition for writs of certiorari.

2. At page 2 of its brief the petitioner, relying upon a "certificate" of the clerk of the United States District Court appearing at page 8 of the petitions for certiorari, states: "He [the trial judge] followed a long established practice at least tacitly approved . . . by the Circuit Court of Appeals for the First Circuit." That so-called "certificate" does not appear to be part of the transcript of record either in the Circuit Court of Appeals or in this Court, see *Evans* v. *Stettnish*, 149 U.S. 605; *Krauss Bros.* v. *Mellon*, 276 U.S. 386. It is difficult to see how the clerk of the District Court can be said to be authorized to reflect the attitude of the judges of the Circuit Court of Appeals. In any event the learned clerk has not presumed to go so far as to say that that Court "tacitly approved the so-called practice."

3. The petitioner states at page 2 that the Circuit Court of Appeals "refused to consider the merits of the appeal . . ." While that Court apparently rejected the so-called bills of exceptions, it does not follow that it did not consider their merits.

4. At page 11 the petitioner states: "The mistake was not that of a litigant . . ." The respondent suggests that it was, at least, incumbent upon the petitioner to see to it, punctually, that the proposed bills of exceptions were properly disposed of rather than to rely upon a conference "with a deputy clerk concerning appeal procedure" wherein counsel

was incidentally "told that the judge had allowed the bills" (Petition for Rehearing, p. 6, attached to the transcript of record accompanying the petitions for the writs of certiorari).

5. On page 23 the petitioner asserts: "The assent [of the respondent to the proposed bills of exceptions] continues until all that is necessary is done to give the bills their intended legal effect. . . ." Quite apart from the fallacy of that statement as a legalistic argument it seems unfortunate that the petitioner should now attempt to convert an act of courtesy on the part of the respondent in thus aiding the petitioner and the District Court in settling the form and contents of the proposed bills into a consent to the allowance of them within or beyond the term or irrespective of contingencies which obviously were not in the minds of counsel for either party. That seems to be stretching the ordinary formal consent to the contents of a proposed bill beyond the bounds of fair play. Neither the language of the consent nor the circumstances attending it warrant such a statement.

6. At page 24 (top) the petitioner states that the Circuit Court of Appeals "held that both it and the District Court were without power now to amend or to correct a 'harmless error'." The phrase "harmless error" is there quoted. Nowhere in the opinion of that Court is that phrase employed. Nor does that Court hold or imply that the lack of authentication was mere harmless error. On the contrary, the Court held that it was dealing with a case which showed an obvious lack of compliance with an Act of Congress as distinguished from a case of "slight technicalities" (R. p. 268, Opinion of the Circuit Court of Appeals).

7. At page 26 the petitioner states: "The course followed was . . . condoned by this very Circuit Court of Appeals." Respondent assumes that no action or inaction by the Circuit Court of Appeals can possibly change the existing law; but even were that possible, there is no justification for the

quoted statement anywhere in the record. It is, moreover, a reflection upon that Court which it has no means of rebutting otherwise than to deal promptly and effectively with the question when it is presented, as it did in this case.

At page 24 and in the footnote thereto the petitioner refers to a stipulation relating to certain exhibits which the parties stipulated might become part of the record before the Circuit Court of Appeals. Without intending to repudiate that stipulation or to comment upon its legal effect at this time the respondent respectfully invites a comparison between copies of photographic views of various parts of the machine appearing in the bound volume and the originals of said exhibits now in the hands of the clerk of this Court. A merely casual inspection will disclose the accidents that can be wrought by photography. The respondent refers to all of these exhibits, if they be competent, but particularly to Exhibit BBB.

At page 29 the petitioner states that Smith "wanted the machine . . . for the purpose of manufacturing steel stairs." The references to the record include treads, risers, and stringers. The distinctions are obvious. Stringers are ordinarily several times as long as treads and risers. These lengths played an important part in the issues of fact before the jury (Statement of Facts and Issues, *supra*).

At page 29 the respondent speaks of "a formal written contract" being contemplated. The reference at page 21 of the record is to "our [petitioner's] regular agreement," which is set forth at page 11 of the record.

At page 31 the petitioner states that "it was admitted that the complaint of June 25 was an error . . . and described a condition which did not exist." But the petitioner neglects to inform the Court that the error was purely inadvertent and consisted merely of describing the site of the difficulty as "fly wheel bearing," whereas what was intended was "fly wheel shaft," and that the petitioner clearly so understood immediately on receipt of the complaint. Exhibit CC (R. p.

30) is the respondent's letter which refers to the "bearing"; Exhibit DD (R. p. 31) is the petitioner's reply, written three days later, and takes it for granted that respondent's letter refers to the "shaft" (see also R. p. 80; also petitioner's present brief, p. 58).

At page 32 the petitioner states: "they [certain experts whom the respondent called in] caused the press to break." The record reference, R. 94, fails to justify such a statement.

At page 32 the petitioner states its version of the respondent's answer to the action on the notes. The respondent respectfully refers the Court to its answer printed at page 3 of the record.

At page 42 the petitioner states: "It was admitted that it takes greater power to set metal than to bend it." The references are to the testimony of Prof. Townsend and Messrs. Kingsland and Ohl. The latter two witnesses were produced by the petitioner. Prof. Townsend was produced by the respondent. Surely the testimony of the witnesses introduced by the petitioner cannot be said to be *admissions* by the respondent. As to Prof. Townsend, what he really said, at page 107, was that the "whole load is used in setting and not bending the material," which simply means that there was a margin of load between the bending and forming requirements of the machine. But the professor also testified, at page 94 of the record, that in his opinion "the machine could not bend ⅜" material of 12 foot 6 inch lengths on dies the female member of which was 3 inches across."

Again, at page 48, the petitioner charges the professors with causing the machine to break. This is unwarranted by the reference, and the jury, by their verdicts, evidently refused to ascribe the break to any fault on the part of the professors.

At pages 48 and 49 the petitioner seems to attribute to the respondent and to Prof. Townsend a demand for a particular kind of safety device. The truth is, the professor's

opinion was that the machine contained *no* efficient safety device (R. p. 105).

At page 59 the petitioner speaks of bending ⅜" metal at petitioner's plant in the presence of one of the respondent's employees. But it neglects to state that the petitioner did not then have a piece of ⅜" steel and improvised a piece of plated metal as a substitute for the test without so informing the employee. Besides, there were three 4-foot pieces bent during that demonstration, but no one 12-foot length. These admissions by the petitioner may be found at pages 163, 164, of the record.

At page 79 the petitioner attributes to Mr. Smith of the respondent company an admission that the machine had a value of $2500. There is not a scintilla of testimony by Mr. Smith to support that statement.

Part One.

Argument of the Law.

I.

The Alleged Bills of Exceptions.

1. Even before the passage of any statute regulating the due authentication of a proposed bill of exceptions it was held by this Court that such a bill, to be entitled to consideration upon its merits, must be signed and sealed by the judge who tried the case.

Mussina v. *Cavazos,* 6 Wall. 355, 363.

2. Then came the Act of June 1, 1872, c. 255 (17 Stat. 197), which this Court held was passed—

> "To make it clear that a seal to a bill of exceptions was not necessary to its validity."

Origet v. *United States,* 125 U.S. 240, at page 244.

3. That view of the Act of June 1, 1872, was affirmed by this Court as late as 1928. This Court then held:

> "With the passage of that Act it is not necessary to seal a bill of exceptions . . . *but the signature is still necessary.*" (Italics ours.)

Krauss Bros. Co. v. *Mellon,* 276 U.S. 386.
See quotation in opinion of Circuit Court of Appeals, R. p. 267.

4. The first case which appears to have come to the notice of this Court under the original Act resulted in a ruling that the initials of the trial judge to a proposed bill of exceptions did not satisfy the statute.

Origet v. *United States,* 125 U.S. 240, 244.
See also *United States, ex rel. Kinney,* v. *United States Fidelity Co.,* 222 U.S. 283.
Malony v. *Adsit,* 175 U.S. 281.
Krauss Bros. Co. v. *Mellon,* 276 U.S. 386.

5. So that it would seem that the Circuit Court of Appeals could not escape the conclusion that the so-called bills of exceptions in the case at bar were "not sufficiently authenticated."

Opinion, R. p. 268; 57 F. (2d) 44.

6. And, as has been pointed out, the various circuits to which the precise question as to the necessity for the judge's authentication was presented, being bound by the law of this Court, ruled likewise.

Goetzinger v. *Woodley,* 17 F. (2d) 83 (C.C.A. 4th Circ.).
Knight v. *Illinois R. Co.,* 180 F. 368, 371 (C.C.A. 6th Circ.).

Oxford &c. R. Co. v. *Union Bank,* 153 F. 723 (C.C.A. 4th Circ.).

7. Irrespective of the judge's contribution to the lack of proper authentication, the respondent respectfully submits that "It is incumbent upon attorneys who practice in the federal courts to observe and strictly follow the rules of practice in preparing and presenting bills of exceptions."

Oxford &c. R. Co. v. *Union Bank,* 153 F. 723 (C.C.A. 4th Circ.).

In the case last cited a so-called bill of exceptions was rejected because, among other things, it was initialed by the trial judge, and the Court there said:

> ". . . nor can the judge after the time within which the bill of exceptions is required to be signed cure an omission or failure to sign the same by certifying that it was allowed, settled and signed within the time allowed by law."

This Court has held that—

> "It certainly cannot be contended that, if the trial judge is able officially to sign the bill of exceptions, it would be competent for counsel to dispense with his action. . . ."

> "The duty of the court of error is limited to determining the validity of exceptions *duly tendered and allowed.*" (Italics ours.)

Michigan Bank v. *Eldred,* 143 U.S. 293, 298, 299.
Malony v. *Adsit,* 175 U.S. 281.

Thus it will be seen that this Court regards it to be the duty of an appellant to see to it that the proposed bill of

exceptions is not only properly and seasonably prepared and presented, but duly allowed as well.

8. *Though petitioner's brief indicates great industry on the part of its learned counsel, the petitioner has failed to cite a single case which is in conflict with the decisions above cited.*

If learned counsel for the petitioner cites *Steen* v. *First National Bank*, 298 F. 36, to control the foregoing cases cited by the respondent, the distinction would seem to be simple. In that case there is no question as to the judge's *signature*. The full name and title of the judge were subscribed. They merely appeared in a space below the blank provided for them. The location of the signature being the only question raised, the Circuit Court of Appeals refused to dismiss the bill.

It may be noteworthy that the case of *Krauss Bros. Co.* v. *Mellon*, 276 U.S. 386, in which this Court held that the signature is still a requisite, was decided in 1928; whereas the case of *Steen* v. *First National Bank, ubi supra,* was decided in 1924.

The respondent therefore submits that the judge's signature is one of the conditions precedent to the consideration of a proposed bill of exceptions in the Federal Courts.

Compare *Thorndike, Petitioner*, 244 Mass. 429, 431.
Wilson v. *Checker Taxi Co.*, 263 Mass. 425.

II.

St. Feb. 26, 1919, C. 48, Now Part of U.S. Code, Tit. 28, Sec. 391.

1. At page 11 of the petitioner's latest brief it says:

> "The error of which we complain is that the Circuit Court did not apply this statute in our case."

2. Nothing is clearer from the decisions and the tenacity with which the Courts have adhered to the requirement of

a proper authentication by the trial judge than that its omission is not regarded as mere harmless error.

The due allowance of a bill of exceptions is a judicial, and not a ministerial, function, and cannot even be waived by the parties.

Malony v. *Adsit*, 175 U.S. 281, 287.
Oxford &c. R. Co. v. *Union Bank*, 153 F. 723, 727.

In the last-cited case the Court, in commenting on the Act of June 1, 1872, regulating the authentication of proposed bills of exceptions, said:

> "This *provision is mandatory, and must be strictly adhered to in every instance wherein a review is sought* by writ of error." (Italics ours.)

Again:

> *"While it is not the policy of the Court to dismiss writs of error in cases on appeal on account of slight technicalities, at the same time, the rules of this Court as well as the rules of the Circuit Court are plain and easily understood. In this case the provision of the statute relating to the question at issue is mandatory and must be enforced. It is incumbent upon attorneys who practice in the federal courts to observe and strictly follow the rules of practice and procedure in preparing and presenting bills of exceptions."* (Italics ours.)

3. Our Circuit Court of Appeals obviously had this statute in mind when it quoted this excerpt from *Oxford &c. R. Co.* v. *Union Bank, ubi supra,* but, impliedly, adopted that Court's reasoning and arrived at the same conclusion.

4. The harmless-error rule was recognized by this Court long before its translation into statutory form in 1919 (St. Feb. 26, 1919, c. 48, now part of U.S. Code, tit. 28, sec. 391).

Vicksburg &c. R. v. *O'Brien*, 119 U.S. 99, 109.
Kalanianole v. *Smithies*, 226 U.S. 463.

Seaboard Railway v. *Moore,* 228 U.S. 433.
Grimes v. *Malcolm,* 164 U.S. 483, 492.

5. It introduces no new principle except that it throws the burden upon the defeated party to show by the entire record the denial of substantial justice.

Robilio v. *United States,* 291 F. 975, 980, 982 (C.C.A. 6th Circ.).
Shuman v. *United States,* 16 F. (2d) 457, 458 (C.C.A. 5th Circ.).

6. The respondent submits that the statute now under consideration is intended to encourage revisory Courts to support rather than review judgments if, on the whole record, such a result can be fairly reached. Or, to put it as one of the cases states the rule:

> "*. . . its purpose was to contract, not to enlarge, our powers of review; it was aimed at preventing reversals for minor errors, not to dispense with exceptions.*" (Italics ours.)

Brown v. *Carver,* 45 F. (2d) 673, 674 (C.C.A. 2d Circ.), and cases cited.

Several of the cases cited in the last-mentioned case are strikingly analogous to the case at bar.

Rumsey v. *N.Y. Life Ins. Co.,* 267 F. 554 (C.C.A. 9th Circ.).
Rosen v. *United States,* 271 F. 651 (C.C.A. 2d Circ.).
United States v. *Penn. R. Co.,* 283 F. 937, 939 (C.C.A. 4th Circ.).
Robilio v. *United States,* 291 F. 975, 980, 981 (C.C.A. 6th Circ.).

In the case of *Rumsey* v. *N.Y. Life Ins. Co.* the Court, speaking of the harmless-error rule, says:

> *"It has no reference to the preliminary steps by which a case is brought into an appellate court . . . nor does it enlarge the power of an appellate court to entertain appeals or writs of error."* (Italics ours.)

In the case of *Rosen* v. *United States* a stipulation was entered into between counsel, and the Court entered an order entitled: "Order settling case," which read: "On the above stipulation the following . . . containing all of the evidence given and proceedings had upon the trial of this action is hereby ordered settled and placed on file in Erie county clerk's office." This was signed by the district judge. The Circuit Court of Appeals in its opinion, at pages 652, 653, says:

> "It is hardly necessary to say that this is not a bill of exceptions . . . *The consent is worthless.* . . . It is only through a bill of exceptions duly authenticated as such that rulings of a judge made at the trial become a part of the record to be reviewed. . . .
>
> "We do not construe the section as authorizing appellate courts to decide on the whole record whether exceptions have been taken or not. *The mischief it was intended to correct is just the opposite of overlooking defects due to negligence, ignorance or inadvertence, viz. the reversal of judgments because of errors, defects, or exceptions which, though raised with technical accuracy, do not affect substantial rights."* (Italics ours.)

The same rule has been applied in other criminal cases.

> *Blakeslee* v. *United States,* 32 F. (2d) 15 (C.C.A. 1st Circ.), and cases cited.
>
> *Redmond* v. *United States,* 8 F. (2d) 24 (C.C.A. 1st Circ.).

In the last-mentioned case the Court, after discovery of an erroneous ruling on evidence, nevertheless held that on

the whole record the substantial rights of the defendant had not been prejudiced, and dismissed the appeal.

This Court, in referring to the Act under consideration, held likewise.

Horning v. *District of Columbia,* 254 U.S. 135.

The essential circumstances do not differ from those which were present in the many cases hereinbefore cited in which the respective bills were rejected.

The respondent therefore submits that by the preponderance of the cases St. Feb. 26, 1919, was intended to enure to the benefit of the appellee rather than the appellant.

III.

U.S. Code, Tit. 28, Sec. 777.

The petitioner contends that the Circuit Court was in error in not remitting the case for amendment of the authentication or refusing to treat it as being amended.

At page 16 of its brief it cites in support of that proposition, among other cases:

Idaho & Oregon Land Co. v. *Bradbury,* 132 U.S. 512, 513.

That case is clearly distinguishable from the instant case. That was a suit in equity which went up on appeal. No bill of exceptions was involved. So that the Act of June 1, 1872, did not apply.

At page 17 of its brief the petitioner cites *Michigan* v. *Eldred,* 143 U.S. 293. There the defendant prevailed in the trial Court; the plaintiff's exceptions were duly allowed. The excepting party came to this Court on a writ of error which included his bill of exceptions. While the writ was pending and after the trial term of the lower Court had expired, the plaintiff persuaded the trial Court to allow an

amendment to the bill of exceptions theretofore allowed as of the date of the original allowance. Thereupon, the plaintiff again addressed this Court with a petition for certiorari based on the amended bill of exceptions, the writ of error being still before this Court.

The Court expressly rejected the amended bill of exceptions, so called, and ordered a new trial for reasons relating exclusively to the original bill of exceptions.

At page 18 of its brief it cites *United States, ex rel. Kinney,* v. *U.S. Fidelity & Guaranty Co.,* 222 U.S. 283, 284, and quotes a portion of the opinion from which it implies that the Court had the power of amendment. But the respondent points out that just before the underlined portion of the quotation the Court says:

> "As to the contentions which relate to occurrences at the trial, they cannot be considered, as the record *contains no bill of exceptions.* The paper in the record styled 'Exceptions to the charge to jury,' initialed 'J.B.McP., trial judge,' and signed by the plaintiff, *is not a bill of exceptions* (Origet v. United States, 125 U.S. 240, 243), . . ." (Italics ours.)

The respondent submits that from this unqualified statement of the law it should be implied that the following sentence is but another reason why, in the judgment of the Court, the bill, even if proper in form, could not be sustained. It surely does not support the inference attributed to it by the petitioner.

On the other hand, on this very point it has been held that the judge is without power, after the time within which the bill of exceptions is required to be signed, to cure an omission or failure to sign it by certifying that it was allowed, settled, and signed within the time allowed by law.

> *Oxford &c. R. Co.* v. *Union Bank,* 153 F. 723, 726, *supra.*

This Court approved rulings of other Courts to the effect that a stipulation upon an agreed statement of facts and law substituted for the action of the Court in settling a bill of exceptions is a nullity. Nor may parties agree that a judge other than the trial judge perform his function in that regard. An unauthenticated bill cannot be validated by consent of the parties.

Malony v. *Adsit*, 175 U.S. 287.

The respondent has shown that several circuits have held that parties cannot by agreement improvise a bill of exceptions.

Rosen v. *United States*, 271 F. 651, 653, and cases cited.

The persistent refusal of the Courts to accept for review any form of presentation other than a formal bill of exceptions duly authenticated would seem to justify the inference that the Courts cannot, or certainly will not, permit amendments to supply the deficiencies, except in those rare instances which will be discussed under the next caption.

IV.

Amendment After the Term.

Counsel for the petitioner concedes, at pages 18, 19, of its brief, that exceptions must be signed before the Court loses jurisdiction by expiration of the term or such time thereafter as may have been duly prescribed.

The petitioner points out that the statute requiring the judge's signature does not include a judgment term limitation. That statute deals only with the requisites of authentication.

At page 20 of its brief the petitioner cites *Matheson's Admrs.* v. *Grant's Admr.*, 2 How. 263, 281, to the proposition

that it is common to amend records after a writ of error has been brought.

In *Michigan Bank* v. *Eldred,* 143 U.S. 293, it is distinctly held by this Court:

> "After the term has expired, without the Court's control over the case being reserved by standing rule or special order, and *especially after a writ of error* has been entered in this Court, all authority of the Court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end." (Italics ours.)
>
> "The duty of the Court of error is limited to determining the validity of the bill of exceptions *duly tendered* and *allowed.*" (Italics ours.)

The Courts have held that after the term the Court is without power to allow a bill of exceptions or any amendments thereto.

> *Exporters* v. *Butterworth-Judson Co.,* 258 U.S. 365, 369.
> *United States* v. *Mayer,* 235 U.S. 55, 67.
> *Delaware Rd. Co.* v. *Rellstab,* 270 U.S. 1.

Furthermore, the amendment cannot be accomplished by a *nunc pro tunc* order.

> *Michigan Bank* v. *Eldred,* 143 U.S. 293.
> *United States* v. *Seale,* 45 F. (2d) 394 (C.C.A. 5th Circ.), and cases cited.

As to the cases cited by petitioner at pages 20, 21 of its brief to illustrate instances of extraordinary circumstances under which amendments have been allowed, the respondent says that they do not support the proposition there stated.

In *Muller* v. *Ehlers,* 91 U.S. 249, the exceptions were rejected because they were not submitted or signed until after the term; and judgment was affirmed.

In *Jones* v. *Grover & Baker Sewing Machine Co.*, 131 U.S. Appx. *cl.*, the bill of exceptions was rejected and judgment was affirmed.

In *Michigan Bank* v. *Eldred*, 143 U.S. 293, a petition for a writ of certiorari, containing a modified bill of exceptions signed after the term, was rejected.

In *United States* v. *Breitling*, 20 How. 252, the bill of exceptions was authenticated after the term, but this Court says, in *Muller* v. *Ehlers*, 91 U.S. 249, at 251, with reference to the Breitling case:

> ". . . it was probably for the reason that, upon the facts stated, the consent for further time beyond the term for the settling of exceptions might fairly be presumed. *That case went to the extreme verge of the law upon this question of the practice and we are not inclined to extend its operation.*" (Italics ours.)

In *Dredge* v. *Forsyth*, 2 Black, 566, the bill of exceptions was filed and allowed within the term; the issue was simply whether the exceptions should be sealed and allowed before the jury retired.

In *Hume* v. *Bowie*, 148 U.S. 245, the term was extended before its expiration by order of the judge.

In *Davis* v. *Patrick*, 122 U.S. 138, the opposing party expressly consented within the term to extension beyond the term.

In *Waldron* v. *Waldron*, 156 U.S. 361, there was express consent within the term to extension beyond the term.

Chateaugay &c. Co., Petitioner, 128 U.S. 544, was a case in which mandamus was granted to compel the judge to settle and sign a bill of exceptions on the grounds that the parties had relied upon an express order during the term. There was compliance with the pertinent rule of the Court, and consent of the plaintiff to belated allowance was inferred.

In *Hunnicutt* v. *Peyton*, 102 U.S. 333, the exceptions were signed within the term.

If extraordinary circumstances exist in this case, the respondent is not aware of them unless the failure of the trial judge to comply with St. June 1, 1872, constitutes such a situation.

But presumably the same defect was, in part, attributable to the judge in each of the following cases:

Origet v. *United States*, 125 U.S. 240.
Malony v. *Adsit*, 175 U.S. 281.
Oxford &c. R. Co. v. *Union Bank*, 153 F. 723.
United States, ex rel. Kinney, v. *U.S. Fidelity & Guaranty Co.*, 222 U.S. 283.

And yet every one of these cases resulted in a dismissal of the review. There was no intimation in any of them that the circumstance of the failure of compliance with the statute constituted such extraordinary circumstances as to warrant a remission for amendment or a condonation of the defect, although the harmless-error rule was in existence either at common law or by statute throughout the period covered by these last-cited cases.

Thus far the petitioner has taken all of the following positions: A deputy clerk told petitioner's counsel that the bills had been allowed; the initials of the judge constituted sufficient authentication; if not, it was the judge's mistake; and the Circuit Court of Appeals should have overlooked it as harmless error or permitted an amendment. To cap the climax the petitioner argues, at page 23 of its brief, that respondent's assent to the proposed bills continues until "all that is necessary is done to give the bills their intended legal effect. . . ."

The true purpose and extent of the assents is more accurately described by the petitioner at page 20 of its petition for rehearing addressed to the Circuit Court of Appeals.

A mere reference to the opinion of the Circuit Court of Appeals, at page 267 of the present record, will show that the position then taken by the petitioner with reference to

the assent of the respondent to the substitute bill of exceptions was that, because it "was assented to by counsel for the A. L. Smith Iron Works [the respondent], therefore we [the Court] should treat it as a bill of exceptions even though not signed by the district judge." Clearly this quotation proves that, at the bar of the Circuit Court of Appeals, the petitioner did not attempt to stretch the assent of the respondent to include an agreement to extend the time for the presentation and allowance of the bill. In any event, the Circuit Court of Appeals did not so interpret the assent nor the immediate contention of the petitioner with respect thereto. On the contrary, the petitioner's position at that time, and the interpretation of the Circuit Court of Appeals of the petitioner's position, was that the assent was restricted to an approval of the form and contents of the bill.

If the petitioner is right in its present contention, it withheld its true purpose from the respondent. But respondent would not even attempt to persuade the Court that the petitioner did withhold such a mental reservation. The fact is apparent that neither counsel contemplated that the mere assent of the respondent to the form of the bills contemplated the contingencies that have since arisen.

This was not an extension of time within which to present and allow the bills, as in—

> *Waldron* v. *Waldron*, 156 U.S. 361, 378.
> *Taylor* v. *United States*, Adv. Opinions, 1931-1932, p. 662.

This Court, in dealing with a case where consent was urged as a ground for the allowance of a bill of exceptions after the expiration of the term, said:

> "So grave a matter as the allowance of a bill of exceptions after the close of the term and after the court had lost all judicial power over the record should not rest upon a mere implication from silence. *There should*

be express consent, or conduct which should equitably estop the opposite party from denying that he had consented. There was nothing of that kind in this case, and the judgment of the Court of Appeals must be affirmed." (Italics ours.)

Jennings v. *Phil., Balt. & Wash. Ry. Co.*, 218 U.S. 255, 257, 258.

In the case at bar there was no express consent to an extension of time for the presentation and allowance of the bill. No such consent was sought by the petitioner because, obviously, it did not require such an extension. There is no intimation that the respondent did anything to mislead the petitioner. The petitioner did nothing, and did not refrain from doing anything, in reliance upon the assent of the respondent other than to present the substitute bills well within the term with the assurance that there would be no contest as to their form. The respondent did not, nor had it any reason to, concern itself further until it received the transcript of record in the Circuit Court of Appeals, and thereupon, at its first opportunity, it openly and clearly asserted its objection and moved to strike the bills from the record. This statement in substance comprehends the conduct of the respondent with respect to the bills.

If this suggestion of the petitioner implies that even now the bills may be allowed, then it follows logically that the petitioner conceives the case to be still pending in the District Court with a bill of exceptions awaiting allowance. That would indeed be an anomalous situation. Surely the petitioner does not imply that the Circuit Court of Appeals has original jurisdiction to allow a bill of exceptions by means of amendment or otherwise. Its function is to deal with errors of law alleged in a bill duly allowed by the trial Court. That is clearly settled by this Court.

Michigan Bank v. *Eldred*, 143 U.S. 293.

V.

Appeal as Affecting Jurisdiction After Term.

An appeal at law does deprive the Court of jurisdiction to allow a bill of exceptions.

> *Jennings* v. *Phil., Balt. & Wash. Ry. Co.*, 218 U.S. 255, 256.

The petitioner cites *Barber Asphalt Co.* v. *Standard &c. Co.*, 275 U.S. 372, at page 24 of its brief, to establish the converse of this proposition. But an analysis of that case will easily show the distinction between it and the case at bar.

That case arose in equity under Rule 75 *b*, which had been promulgated seven years before the case was decided. This is an action at law and arises under a statute in force since 1872. It was held in the Barber Asphalt case that a cause in equity could, in the discretion of the Appellate Court, be remanded for correction of the record on appeal and that the Court exceeded its discretion in refusing to so remand. But this Court added that a distinction must be observed between reviews at law and in equity, and at page 385 cites in that connection:

> *In re General Rule 75*, 222 F. 884 (C.C.A. 6th Circ.).
> *Struett* v. *Hill*, 269 F. 249 (C.C.A. 9th Circ.).
> *Sussex &c. Co.* v. *Midwest &c. Co.*, 294 F. 597, 600 (C.C.A. 8th Circ.).
> *United States* v. *Mayer*, 235 U.S. 55, 67.

At page 21 of its brief the petitioner cites:

> *Taylor* v. *United States*, 52 Sup. Ct. Rep. 466.

There the Court distinctly held that the parties had agreed to an extension of the time to present a bill of exceptions to May 17th, which happened to be a Sunday. That on the 18th

"in pursuance of the earlier agreement the judge signed the bill." No such situation is disclosed in the instant case.

Much stress is laid by the petitioner upon a so-called certificate of a clerk of the United States District Court in which he says in substance that bills of exceptions in this district have been signed both by initials and full signatures and that the question of their validity has never been raised until this case arose. Having had no opportunity to know that such a statement would be elicited or engrafted upon the record, the respondent has not delved into the records of the Court to examine all the cases in this district within either category (Petn. for Cert. pp. 8, 9). But the respondent submits—

a. That ex-parte and gratuitous statements are not part of the bill and are not entitled to consideration.

b. The question may not have arisen before now in this jurisdiction; but obviously it has arisen repeatedly in other jurisdictions and been uniformly condemned. This Court reiterated the law as late as 1928.

Krauss Bros. Co. v. *Mellon,* 276 U.S. 386.

c. It is not the duty of the Circuit Court of Appeals to notice the defect of its own motion; appellees may waive it.

d. If the cases referred to by the clerk are cited as precedents for the proposition, this Court has held that it will not treat as precedents, nor differentiate, cases in which the precise issue was not raised.

Webster v. *Fall,* 266 U.S. 507, 511.

e. It is assumed that St. June 1, 1872, cannot be abrogated by custom.

The Circuit Court of Appeals deals with the question of amendment after the term as matter of law as well as discretion.

As to the ruling of the Circuit Court of Appeals that it was too late to remand the case to the trial Court for amend-

ment, the respondent submits the Court's opinion shows abundant authority for its conclusion.

As to the question whether the Circuit Court should have treated the bill as having been amended to conform to the requirements of the statute, the Circuit Court of Appeals considered that question from a discretionary viewpoint, as is indicated by its quotation from the opinion of Pritchard, J., at page 268 of the record, and obviously concluded that the circumstances did not entitle the petitioner to that relief. This conclusion is one of the subjects of criticism by the petitioner (see Petitioner's Brief, p. 3, par. 5, where the petitioner appears to epitomize the facts on which it seems to rely for discretionary favor).

Even if these assertions were properly a part of the record, the respondent submits that they fall far short of making out a case for the favorable exercise of the Court's discretion. On the record it cannot be said that the Circuit Court of Appeals abused its discretion.

VI.

The Contents of the Record.

The following documents have, in one way or another, been injected into or engrafted upon the papers before this Court in contravention of law, *i.e.:*

1. The so-called "Motion to amend substitute bill of exceptions" (Minute Entries, R. p. 6).

On August 8, 1930, the petitioner filed its "substituted bill of exceptions" bearing the respondent's assent.

The record discloses that on August 20, 1930, the substituted bill of exceptions, said motion to amend the substituted bill of exceptions, and the bill of exceptions concerning the plaintiff's motion for new trial were allowed (R. p. 6).

The respondent can account for the bill of exceptions

relating to the new trial motion. It is assented to and identified in the record (R. p. 226).

But as to the motion to amend the substituted bill of exceptions the respondent was, and still is, mystified. It has no separate place in the transcript of the record, and the only way respondent can account for that fact is as follows:

At page 6 of the petitioner's petition for rehearing addressed to the Circuit Court of Appeals, which we understand was before this Court in conjunction with the petition for the writ of certiorari, the petitioner says:

> "The appellant duly and seasonably presented 'assented to' bills of exception to the trial judge for allowance."

But at page 19 of the same document the petitioner says:

> "On August 8, 1930 appellant filed two substitute bills of exception, assented to, and a motion to amend, *not* assented to. On August 20th. appellant's counsel told the trial judge of the above and asked to have a date assigned for hearing on the motion." (Italics ours.)

And the petitioner goes on to say, in substance, that the judge indicated he would allow it in the absence of the respondent and without notice or hearing. Thereafter, on that day, it appears that the substitute bills, to which the respondent had assented, as well as the exceptions relative to motion to amend it and to the motions for new trial, were so allowed. There is nothing to show that respondent's counsel had any knowledge of these occurrences, and the plain inference is that they were not aware of them until the transcript of record was served on them.

It then developed, for the first time, that the motion to amend the substitute bill of exceptions, not bearing the respondent's assent, had somehow or by some one been merged into the substitute bill of exceptions which did bear the respondent's assent (see Transcript of Record before

the Circuit Court of Appeals, p. 7; Transcript of Record before this Court, R. p. 7).

The respondent submits that this situation discloses that the so-called substitute bill of exceptions before the Court is not in all respects accurate, and should *therefore* be rejected.

2. Stipulation as to exhibits.

On page 224 of the present record there appears a stipulation as to exhibits not incorporated in the bills of exceptions. While the stipulation is undoubtedly signed by respondent's counsel, they consider it their duty to call the attention of the Court to the fact that it is not certified by the clerk or authenticated by the trial judge.

The only reference in the so-called bill of exceptions to exhibits not incorporated therein is to be found on page 11 of the present transcript of record. Respondent submits that too much is left to conjecture as to what is referred to in that statement at page 11, aforesaid, notwithstanding the stipulation happens to be included in the transcript. Nor is the stipulation effective to waive certification.

The respondent respectfully submits that the stipulation is not properly part of the record, and should be rejected.

> *Krauss Bros. Co.* v. *Mellon,* 276 U.S. 386.
> R. p. 267 (Opinion of the Circuit Court of Appeals).

The petitioner relied in its brief, to some extent, upon some of the exhibits referred to in this stipulation, for example: Exhibits 14, 17 (Brief, p. 36); Exhibits OOO, RRR (Brief, p. 80).

3. "Request of trial judge," "certificates" of the clerk and deputy clerk of the United States District Court, and petitioner's brief to the Circuit Court of Appeals.

The petition for rehearing submitted by the petitioner to the Circuit Court of Appeals and the brief of the petitioner

on its petition for the writs of certiorari addressed to this Court are presumably among the papers now on file in this proceeding.

The petition for rehearing has been omitted from the present transcript of record, but respondent cannot foretell whether or not, or to what extent, it will be considered by the Court.

Attached to it are the "Request of Trial Judge," p. 42, "Certificate of Clerk," p. 38, "Certificate of Counsel," p. 36, "Affidavit of Louis B. King," p. 37, "Supplementary Facts, etc.," p. 19. There is also attached to the petition for the writs "Certificate of James S. Allen, Clerk," p. 8.

All these statements are obviously ex-parte and self-serving. While they do not appear to the respondent to be harmful to it, the respondent submits that on the authority of *Krauss Bros. Co.* v. *Mellon,* 276 U.S. 386, and Rule 38, par. 1, of this Court, they are not properly part of the record, and should be disregarded.

Merely by way of illustrating the danger of accepting such ex-parte statements and the value of the rule excluding them, respondent points out that, in the footnote referred to, the petitioner states: "Neither then nor later did they [respondent's counsel] file or present any formal motion to that issue."

Fortunately that statement is refuted by the Circuit Court of Appeals in its opinion, R. p. 266, where it states: ". . . and for this reason they [respondent's counsel] move that the bill of exceptions be stricken from the record."

The footnote at page 2 of the petitioner's brief incorporates, by reference, the petitioner's supplemental brief to the Circuit Court of Appeals and other matters, all of which, under the rule of this Court above referred to, the respondent submits, are not properly part of the record before this Court, and should not be considered.

Harding v. *Illinois,* 196 U.S. 78, 84.

Conclusion on This Branch of the Case.

The respondent submits in conclusion as to the issues arising out of the alleged bills of exceptions:

1. The petitioner has failed to establish its burden of showing error of law or excess of discretion on the part of the Circuit Court of Appeals.

2. That this Court has not ignored St. June 1, 1872, nor regarded it as obsolete. And the Circuits which have had occasion to deal with it have consistently and uniformly followed the law given them by this Court.

3. No rule has been more rigidly enforced than that which deprives the Federal Courts of law of all jurisdiction of bills of exceptions after the expiration of the term unless it has been definitely extended by order or agreement within the term or unless "extraordinary circumstances" have intervened.

4. St. Feb. 26, 1919, the so-called harmless error statute, was enacted, not to encourage appeals, but to prevent reversals; not to protract, but to terminate, litigation.

These being the principal issues raised by the petitioner in this branch of the case, we proceed to apply them to the errors alleged in the plaintiff's brief, at page 3 thereof:

1. There is not the slightest divergence of views among the Circuits on any of these fundamental principles. In any event, this Court has spoken on each of them in unmistakable language.

2. The pertinent statutes and the adjudications thereunder constitute mandates to the bar, and through them to the public.

3 Observance of these mandates would conduce to uniformity and precision of procedure. Indifference and disdain of them are bound to lead to undue confusion, delay, and waste.

4. To permit a litigant to ignore salutary rules of procedure—nay, statutes of procedure—with impunity is to

put a premium on laxity and discourage those who do endeavor to conform to them.

Notwithstanding the severe and unpardonable attack made by the petitioner upon the learned Circuit Court of Appeals at page 25 of the petitioner's brief, the respondent submits, as a fitting climax to this portion of its brief, the following extract from the work of Mr. Justice Story on Equity Pleading (sec. 544), where he comments upon the necessity of adhering strictly to the prescribed forms of procedure:

> "The want of due form constitutes a just objection to the proceedings in every court of justice, for to reject all form would be destructive of the law as a science, and would introduce great uncertainty and perplexity in the administration of justice. Every irregularity of this sort is fraught with inconvenience, and generally tends to delays and doubts. And it has been well remarked that infinite mischief has been produced by the facility of courts of justice in overlooking errors of form. It encourages carelessness and places ignorance too much on a footing with knowledge amongst those who practice the drawing of pleadings."

It is therefore respectfully submitted that the Circuit Court of Appeals was right in affirming the judgments of the District Court.

Part Two.

Assignments of Error.

The respondent desires to make it clear to the Court that it does not waive or lack confidence in the contentions made in Part One of this brief, but submits its comments on the assignments of error claimed by the petitioner with a view to demonstrating to this Court that they are not tenable and that, on the whole record, no harm was done the petitioner by the rejection of the so-called bills of exceptions.

General Rule Relating to Rulings on Questions of Evidence and Refusals of the Court to Charge the Jury in Accordance with Specific Requests on Isolated Portions of the Evidence.

Irrespective of the arrangement of assignment of errors in the transcript of record a careful examination of them will disclose that they actually comprise about 120 separate and distinct alleged errors. It now appears from pages 27 and 28 of the petitioner's brief that it has decided to waive a few of the alleged errors.

A large proportion of the alleged errors relate exclusively to rulings on questions of evidence. In no instance does it appear that the petitioner supported its objection to such rulings by a statement of the grounds therefor.

The respondent respectfully submits that it is a well-settled rule of the Federal Courts that exceptions predicated upon such rulings under such circumstances are not reviewable *as matter of right.*

Blakeslee v. *United States,* 32 F. (2d) 15, 17 (C.C.A. 1st Circ.).

The petitioner, prior to the judge's charge, filed 76 written requests for rulings to be given to the jury. These rulings bore on isolated portions of the alleged testimony and were all refused by the trial Court, with one exception. The petitioner in its assignments of error has alleged error in the denial of each and every one of these requests. It is a well-established rule of practice that it is largely a matter of discretion with the presiding judge as to how far he will discuss the different phases of the testimony upon a particular subject and give specific instructions, each founded upon only a part of the testimony appearing upon the subject.

Pennsylvania Co. v. *Olivit Bros.,* 243 U.S. 574, 583.

Herrick v. *Waitt,* 224 Mass. 416.

Buckley v. *Frankel,* 262 Mass. 13.

Hicks v. *N.Y., N.H. & H. R.R. Co.*, 164 Mass. 424, 428.

These comments are made at this point because of their uniform applicability to the respective classes of rulings referred to and also to avoid redundancy.

Discussion of the Assignments of Error.

The respondent will deal with the alleged errors now urged by the petitioner in their numerical order, shown in petitioner's brief, pp. 27, 28.

1. The petitioner stressed the so-called acceptance of the machine. But, in addition to the fact that the memorandum of acceptance was nothing more than an expression of opinion by Hovasse that "it was satisfactory," and was not the result of a test under conditions prescribed by the memorandum of sale and warranty later entered into, it was not conclusive as to performance; the circumstances under which it was given could be introduced to explain it (R. p. 60).

Incidentally, the objection noted by the petitioner relates to "all the conversations prior to the date of the written contract declared on." Such a sweeping and anticipatory objection would seem to be improper, although the respondent has dealt with it as though it were properly presented and saved.

As to the second objection within this assignment of error, the respondent submits that the answer of the witness Smith was, in the main, responsive to the question asked him on cross-examination by counsel for the petitioner. Such portions of the answer as may not have been strictly responsive were harmless repetitions of things which the witness had already testified to. Moreover, the request was to strike out the whole answer, and not any portions of it.

Answering some of the suggestions of the petitioner at pages 35-37 of its brief, it will appear on reference to the

present record, p. 253, that the petitioner regards the contract between the parties as being contained in several letters, a set of specifications, and an agreement with a rider thereto attached. Since this motley group of documents, bearing different dates, relating to different subjects, and containing no correlating references to each other (except as to the specifications which are referred to in one of said documents), constituted the petitioner's idea of the contract between the parties, the respondent submits that oral evidence is necessarily admissible if for no other purpose than to connect them. Incidentally, there were several letters other than those mentioned by the respondent which passed between the parties in the course of the correspondence referred to in said assignment, all of which would seem to come within the same category.

Nickerson v. *Weld,* 204 Mass. 346, 356.
Bird & Son v. *Guarantee Construction Co.,* 295 F. 451, 456 (C.C.A. 1st Circ.).
Davenport Ladder Co. v. *Edward Hines Lumber Co.,* 43 F. (2d) 63, 66 (C.C.A. 8th Circ.).

The petitioner makes the point that the declaration in the respondent's action relied upon a written contract. The respondent submits that the declaration was sufficient to support the claim of an implied warranty; but, in so far as the petitioner now bases assignment 1, which deals exclusively with admission of evidence, upon pleadings, such objection was never specified until after the verdict, *i.e.,* in the form of the assignment now under discussion. Such an objection is not tenable.

Amer. Sugar Refin. Co. v. *Nassif,* 45 F. (2d) 321, 323 (C.C.A. 1st Circ.).

The petitioner claims certain special damage (R. pp. 230, 232). The evidence objected to was, in part, admissible on this issue.

Hanson v. *Wittenberg,* 205 Mass. 319.

2. On cross-examination by petitioner's counsel Mr. Smith had testified as follows: He was able to read blueprints and the specifications (R. p. 50); that the "specification is satisfactory to me if it will do what it says it will" (R. p. 54); that "I had been studying the blue prints received with the November 9th letter for several months and I wanted the machine built as shown in those blue prints"; that he saw nothing incorrect in the confirmation, Exhibit D (R. p. 52).

The respondent's contention throughout was that it had bought the machine for certain purposes clearly disclosed to the petitioner, and that the petitioner had impliedly warranted that the machine would accomplish those purposes. The cross-examination obviously attempted to discredit the witness Smith by showing he could not understand the blueprints and specifications relating to the machine, and could therefore not have intended to contract with reference to its suitability for the purposes to which he had testified. In view of this state of the evidence it was discretionary with the Court to permit the witness to state his understanding of the specifications with particular reference to the class of work he planned to do (R. p. 56).

At pages 40-41 of the petitioner's brief the petitioner asserts that the "contract contained no ambiguous words or phrases or any that Smith claimed as having any particular or trade meaning."

There was no issue of fact in the case that was more strenuously contested and consumed more time, as the record will indicate, than the respective contentions as to the meaning and scope of the word "bend."

There was no contest as to the business in which the respondent was engaged. It required of the machine in question the formation of commercial products. At page 15 of the record Mr. Smith of the respondent company made it clear at the outset that the steel is "placed on the machine and bent to form stair stringers to the side of a stair upon which the tread and risers are riveted. . . ." The stringers

are usually bent to a 90° angle, or square. On the other hand, the petitioner took the position that the press would not form the metal, but merely bend it (R. pp. 48, 183). Thus the issue of fact was framed. So that the petitioner contended that all that the machine was required to do was to bend the metal, irrespective of the extent of the bend or the shape of the product after it was bent. To illustrate the confusion, even in the mind of the principal spokesman of the petitioner company, his own superintendent in the course of his testimony definitely stated that forming the metal to a 90° angle or to the desired shape was the ultimate object of the bending process (R. p. 141).

The judge was unable to see why the respondent would want to bend steel without setting (forming) it (R. p. 219). The question as to what that term meant was properly left to the jury. It was ambiguous.

The term "bend" does not appear in the agreement of March 9th (R. p. 11), nor in the rider attached thereto. It first appears in the specifications. There it is qualified by descriptive language such as "this machine has been built to meet the demand for a machine which will bend the heavier gauges of metal *with ease* and you can *also bring out in fine detail, multiple bends* which cannot be accomplished in the lighter machines of this class" (R. p. 48). (Italics ours.) The dies are all 90° sharp-cornered. At page 20 of the record a letter of the petitioner to the respondent contains the following: "The corners will be as sharp as the material will allow." In the same letter petitioner says: ". . . we enclose drawings #5190 to 5193, inclusive, showing dies for *forming* tread and riser ends. . . ." (Italics ours.)

Then there is the letter from respondent to petitioner, Exhibit L (R. p. 21), calling for five sets of dies "for our riser . . ." "Also please manufacture a set of dies *to bend material at ninety degrees the full length of the machine.*" (Italics ours.)

That order is acknowledged in terms in Exhibit O (R. p. 21).

Again on page 22 of the record the phrase "The square on 90 degree die . . ." appears as having been "furnished by Ohl."

The blueprints all show sharp-cornered dies (Exhibit P, one of the exhibits referred to in the stipulation, at page 224 of the record).

Mr. Smith testified that he told Mr. Ohl that he wanted a machine which would form treads and risers (R. pp. 15 and 16).

Ohl agreed that Smith told him he wanted a press to make stair risers and stringers (R. p. 145), and that he, Ohl, realized that Smith did not know how to make dies, but that Ohl had made them, planned them, experimented with them, put them in the press *and formed* metal, had stopped at plants and told them how to put in the metal, etc. (R. p. 146).

Nowhere in Ohl's testimony is there any substantial difference between him and Smith relative to their preliminary communications on this subject.

Hovasse testified on cross-examination that when he was at the Ohl plant getting instructions as to how to manipulate the machine Ohl's foreman told him to use a piece of scrap and adjust the dies gradually *"until it squeezes into the right shape"* (R. p. 70). (Italics ours.)

The foregoing are but a few of the indications from the evidence that to accept the word "bend" as used in the specifications in the narrow and restricted sense asked for by the petitioner would be to distort the true intent and purpose of the parties and to permit the petitioner to escape liability by a mere play on words.

It was for the Court to determine, in the first instance, whether the word "bend" as used in the specifications, above referred to, was plain and unambiguous, or whether it was doubtful and required explanation in the light of the subject-

matter to which the transaction related and the circumstances under which it was entered into. The judge properly ruled that it was a phrase that required explanation, and was therefore warranted in admitting the evidence complained of in assignment 2.

West End Co. v. *Warren Co.*, 198 Mass. 320, 325.
Linton v. *Noonan,* 238 Mass. 31, 38.

In other words, there were several reasons, at least, for the admission of that evidence.

3. The witness Hovasse was a machinist, and so regarded by both sides. During its cross-examination of this witness the petitioner attempted to make it appear that the phrase "fly wheel bearings" used by him in respondent's notice of complaint, Exhibit CC (R. p. 30), was erroneous and misleading (R. p. 75); immediately after the introduction of Exhibit CC the reply thereto from the petitioner, Exhibit DD (R. p. 31), was introduced, and that clearly showed that the petitioner understood the reference to mean "fly wheel shaft" instead of "fly wheel bearing." But at page 82 of the record counsel for the respondent called the attention of the witness Hovasse, who had written the letter, Exhibit CC, to the reply, Exhibit DD, wherein the petitioner said: "an ordinary machinist should be able to take down the fly wheel shaft"; and then asked whether that shaft was the one on which the fly-wheel bearings and connections are mounted; to which he replied, "Yes, sir"; and further, he said, without objection, that he had told counsel for the petitioner that when he, the witness, read Exhibit DD, he learned that Mr. Ohl had understood his complaint.

At this point the question objected to was put. It was in part to prove the *bona fides* of the witness in using the term and also by way of summarizing what had just preceded it. It is respectfully submitted that the Court did not err in admitting this evidence, and further that it was no more

harmful to the petitioner than the questions and answers immediately preceding it, which went in without objection.

4. The witness last referred to had done all he could to satisfy counsel and the Court that his error in the use of the term "bearings" was an inadvertence, and had shown that the petitioner understood the true point in the machine referred to. Nowhere in the testimony of witnesses offered by the petitioner does it appear that the appellant was misled by or misunderstood the reference. The parties and the Court proceeded upon the assumption that the error had been satisfactorily explained. The objection was merely to the refusal of the Court to allow the spot referred to in the letter, Exhibit CC, to be identified on a paper not yet in evidence. It is submitted that the Court had the discretionary power on cross-examination to refuse to permit such an identification, and particularly an identification which would confuse rather than aid the jury. Exhibit TT, referred to in this assignment, is among those not included within the alleged bills of exceptions, though it is included in the stipulation relating to certain exhibits (R. p. 224). The assignment of error shows that Exhibit TT, on which the identification was sought, had not yet been put in evidence, and that the objection was not to the exclusion of Exhibit TT, but to the refusal of the Court to permit the identification of something upon it.

For some reason which the respondent is unable to divine, the petitioner takes occasion in discussing assignment 4 at page 57 of its brief to involve references to the notices of defects given by the respondent to the petitioner. The particular question which forms the basis of assignment 4 cannot possibly have any reference to the question of notice. It is evidently an afterthought. No question was made by anybody at the trial that the first notice given by the respondent to the petitioner was dated June 25th and that operations on the machine began April 15th, each of 1926. Nor was there the slightest doubt as to what this notice contained or that

the site of the trouble was incorrectly described. The notices will be discussed under the assignments dealing with that subject-matter.

7. As an operator on this very machine the witness was properly permitted to testify to the improbability of the machine being able to bend 3/8" stock to a 90° angle, having already testified that it actually failed to bend thinner stock to the same angle without bowing (R. p. 86). Bending 3/8" stock was the extreme capacity mentioned in the written warranty.

As in all other instances of the petitioner's objections, no indication was given by it as to the ground for this objection. It now argues at page 82 of its brief that the difficulty with the question was that it contained no reference to the size of the die. The fact is that the testimony objected to in this assignment was elicited on redirect, after a lengthy cross-examination concerning dies. After the redirect had been finished, the petitioner again took the witness and cleared up any possible doubt as to the distinction between the effect of the bend on a 2¼" die and the 3" die, which is all that this objection relates to (R. p. 91).

8. The witness, the operator on the machine in question, was apparently believed by the Court to have sufficient knowledge of the workings of the machine and their results to entitle him to give the obvious opinion asked for. That was discretionary with the Court, and it is submitted that the Court's discretion was not exceeded. Mr. Ohl, of the petitioner company, practically agreed with this witness (R. p. 184).

In this instance the question incorporates all the elements, *i.e.*, the thickness of the stock, the angle, and identity of the die.

10. In the specifications furnished by the petitioner to the respondent (R. p. 48) the petitioner represents that "this power adjusting motion is protected by our patented fric-

tion frog gear marked 'B' on enclosed blueprint, which is adjusted (so) that it will just lift the weight of the slide or hammer, and if the operator adjusts the slide down hard on the dies or up to the extreme limit, this gear will slip and no damage will be caused." Mr. Ohl testified the friction clutch is a safety device (R. p. 148).

The Court will kindly note that there is no question upon which the answer objected to in this assignment was predicated (R. p. 97). Furthermore, this evidence was elicited from the same witness by a question put by the Court without objection (R. p. 97).

In addition the respondent points out that these cross-actions were tried together and one of the issues raised by the respondent in its answer to the petitioner's action on the notes was lack and failure of consideration. This issue, in and of itself, warranted the evidence in question.

Furthermore, the question is not as to what kind of a safety device this machine had, as argued by the petitioner at page 48, but rather whether it had any.

11. The qualifications of the witness Perkins were clearly established (R. p. 110).

The question bore on the issue as to whether the machine was "of the best workmanship," and was fit to form steel of thicknesses up to three eighths of an inch and of angles of 90°, for use as stairs and stringers, without a safety device, in the light of the fact, then before the jury, that the machine, though properly adjusted, broke while being subjected to a less stringent test.

The respondent reiterates its references to the issues in the note action referred to under No. 9, and also refers to the argument under No. 7.

12. The various computations and consultations and the qualifications of the witness are set forth in his testimony (R. p. 110). Examination of the whole testimony of the witness shows that the evidence was competent, relevant,

and material. Whether the machine had a proper factor of safety was clearly competent and material on the issue of the cause of the break, and as to whether the machine was of the "best workmanship and material," which is part of the express warranty. Ohl contended that the break was due to overloading, and the question of the factor of safety in the machine became important in view of this contention, as well as on the issue of the fitness of the machine and the character of the "workmanship and material."

18. The question here objected to was put to a witness who represented the firm which had built the housings in question for the petitioner. The purpose of the question was to see whether his foundry had guaranteed the tensile strength and endurance of the housings to the petitioner.

This question was clearly admissible on cross-examination of the witness. The witness had testified as to the tensile strength of the housings on direct examination, and this question was admissible on the question of the credibility of the witness and the nature and purpose of the tests which the witness testified to on direct examination (R. p. 131).

19. The witness did not qualify as an expert on machines of this character; his field was restricted to castings. It was within the Court's discretion to reject the question. In any event, the opinion called for would necessarily have been based upon the opinion of another witness, and not upon a fact, as such.

In its present brief, p. 81, the petitioner contends that the purpose of this offered evidence was to meet evidence which the petitioner anticipated would be offered by the respondent. At the trial no such purpose was disclosed by the petitioner (R. p. 250).

21. The question is obviously incompetent because it would permit the witness to state his mental attitude toward the letter; and whether or not the letter or its purport meant anything was, in the last analysis, for the jury.

The respondent has heretofore demonstrated that the petitioner knew exactly what portion of the machine was meant to be referred to in the letter, Exhibit CC (Petitioner's Brief, p. 58).

23. This exhibit related only to tensile strength. In view of the testimony relative to tensile strength introduced by the petitioner through its witness Davis (R. pp. 131-132), the testimony of Ohl (R. p. 206), and the testimony of Mann (R. p. 208), this exhibit was relevant and material.

Like other tests which were attempted, it bore on the question of whether or not the material was of the "best" as required by the warranty.

24. This evidence was admissible within the discretion of the judge. The question of the tensile strength of the machine was gone into by counsel for Ohl, prior to the production of this witness (see testimony of Davis, R. pp. 131-132). The evidence in question was clearly relevant, and its significance was a fit matter to be considered by the jury.

The petitioner's brief, at page 81, complains that the specimens taken were taken from the machine without offer of proof as to when they were taken from the machine—before or after this crystallization—or as to the place in the stanchion from which they were taken. Both the place from which they were taken and the time when they were taken were definitely shown in the testimony of Hovasse (R. p. 210).

25. This evidence was properly admitted by the Court. The subject-matter had been gone into in the examination of witnesses who had testified prior to Mr. Mann. On cross-examination counsel for Ohl brought out the fact that, if a test bar is taken from a section that has been overloaded, such a test bar might show a slight difference in strength from that which the machine had before the overload, so that the contention of the Ohl Company was presented to the jury (R. p. 209).

26 and 27. The petitioner was not entitled, as of right, to an order requiring the respondent to elect as between its defense to the action on the notes and its cross-action.

Water &c. Co. v. *City of Hutchison*, 160 F. 41 (C.C.A. 8th Circ.).
Cinamon v. *St. Louis Rubber Co.*, 229 Mass. 33.
Snow v. *Alley*, 156 Mass. 193.
R.C.N. Mfg. Co. v. *Whittaker*, 49 R.I. 499; 144 Atl. 158.

The *remedies* between which the petitioner contends the respondent should have elected necessarily consist of the respondent's *answer* to the action on the notes and its cross-action.

In the first place, the petitioner assumes that these motions were too broad, in that the answer included a general denial as well as want and failure of consideration. So that the respondent will argue these assignments as though the motions related specifically to the special answers relating to consideration.

Under such answers it was open to the respondent to defend without rescinding.

Harrington v. *Stratton*, 22 Pick. 510.

The agreement between the parties (R. p. 11) is, at best, a conditional sale; either absence or failure of consideration is recognized by the Negotiable Instruments Law of Massachusetts as a defense *pro tanto* against a person not a holder in due course, "whether the failure is a liquidated or unascertained amount or otherwise." (Italics ours.)

Gen. Laws, c. 107, sec. 51.

Mere non-fulfilment by the petitioner of its agreements and warranties in consideration of which and by the very

terms of which the notes were given (R. p. 11 *et seq.*) was a complete defense under the respondent's answer.

Hawks v. *Truesdell,* 12 Allen, 564.

Neither absence nor failure of consideration is tantamount to recoupment. The two classes of defenses are clearly distinguishable.

Jackman v. *Doland,* 116 Mass. 550.

It has been recently held in Rhode Island that, where an article proved to be inferior to the warranty accompanying the sale, the breach could be set up in terms by way of defense, and the purchaser, having prevailed in the action against him, could not only proceed with his independent action for damages, but the judgment in the previous case could be introduced as *res adjudicata* on the matter of the breach, leaving nothing but damages for determination in the second action.

R.C.N. Mfg. Co. v. *Whittaker,* 49 R.I. 449; 144 Atl. 158.

In Massachusetts, where cross-actions arising out of the same contract of sale are tried together, one for recovery of the purchase price and the other for breaches of the agreement of sale, it has been held that the damage sustained by the purchaser, "must be assessed and applied first to cancel, *in whole or in part,* the sum due upon the contract for the goods delivered; if it exceeded that balance the excess would be returned in a verdict for the plaintiff in a cross action." (Italics ours.)

Star Glass Co. v. *Morey,* 108 Mass. 570, 573.
See also *Linen Thread Co.* v. *Shaw,* 9 F. (2d) 17 (C.C.A. 1st Circ.).

So that, applying this law to the facts in these cases, we find that, when the action on the notes was brought, the re-

spondent had paid out over $5000, including $2250 in spot payments and the remainder in the redemption of notes and interest; and had also paid out over $2600 to brace the machine, which had in the meantime cracked. Thus it was out of pocket over $7500 in cash and had a broken machine on its hands; prior to the break it had turned out some work with the machine which did not require a test of its guaranteed capacity, but the product had to be reworked by hand to recover it from bowing and other irregularities (R. p. 95).

Thus in less than six months after the arrival of the machine, without any fault on its part, it had a machine broken in a vital place, and therefore valueless (R. pp. 94, 95). If the respondent had dismantled the machine and returned it and had to restore its premises, its losses would have been even greater; it was too ponderous to move. It had been affixed to a rigid foundation built into the petitioner's premises. Its dimensions and weight appear in the respondent's Statement of Facts, Part One.

This was the situation when the action on the notes was brought. The respondent was confronted with the problem as to whether it should have to pay for a useless machine and rely for its reimbursement and damages on an independent action. This, the respondent submits, not only seemed an idle ceremony, but also tended to deprive the respondent of its just defense to the notes.

The law, as has been noted, recognizes that defense. If the petitioner's action had been on the agreement, a general denial would have sufficed. The action was based on notes; hence the respondent pleaded want and failure of consideration.

But the respondent conceived its damages to be greater than the balance due on the notes. It did not seek double damages; it sought only to be made whole. Thus it brought its own action.

It sustained the following damages: The amount it had already overpaid, which it claimed was the entire $5000;

the amount it had paid out to sustain the machine, $2631; and the sum of $3000 which Mr. Ohl of the petitioner company himself said was the difference between what the machine sold for and its real value when delivered (Exhibit FF, R. p. 33). These elements omit any consideration of the losses sustained by the respondent by reason of the inability of the machine to comply either with the express warranty to bend soft steel of a maximum thickness of three eighths of an inch on 3″ dies, or its unfitness to turn out merchantable products.

The situation that the Smith Company was in at the time of the action on the notes is recognized by the Sales Act. Section 59 of chapter 106 of the General Laws, the section immediately following that dealing with the rights of the buyer in the event of a breach of warranty, reads:

> "Interest and Special Damages.—Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed."

It appeared from the evidence that the Smith Company had paid in approximately $5000 and had expended $2500 in attempting to repair the press, thus constituting special damages, and that the Smith Company had a worthless machine. Clearly enough, the Smith Company should not pay any more on the notes for a worthless machine and should get back the money paid therefor, and for its repair, $7500. The way the Court charged the jury in this regard was not at all unfavorable to Ohl. The Court might well have told the jury to make the Smith Company an allowance for the special damage it incurred in its business, and for the fact that the machine was represented to be worth more than the contract price and that the Smith Company had lost the benefit of its bargain (Exhibit FF, pp. 33-34).

In respect to the plaintiff's damages, the petitioner's argument in its brief involves two fallacies as we see it. The first is that the Smith Company was keeping the dies and motor. In this respect the attention of the Court is called to the fact that the dies and motor were made for this specific machine and that the purchase was an entire one (R. pp. 11-12).

Barlow Co. v. *Stone,* 200 Mass. 158, 160, and cases cited.

It is clear that dies fitted for use only in a broken machine that could not perform the work it was supposed to do were worthless apart from the machine.

The second is the misstatement contained on page 79 of the petitioner's brief: "Yet Smith's own evidence admitted a $2500 value for the press." Smith did not testify as to the value of the press. The only evidence as to the value of the press came from a Mr. Perkins, a witness for the plaintiff, by whose testimony the plaintiff is not bound, and who testified that in March, 1926, *before the machine broke,* the machine had an estimated market value of $2500.

In the light of the evidence, and in the estimation of the Court, the verdicts rendered were logical and consistent.

28 and 29. These assignments are based on the judge's refusal to direct verdicts for the petitioner in both cases, and, to avoid repetition, they are here dealt with jointly.

It is respectfully submitted that the proper solution of the issues between the petitioner and the respondent required submission to the jury of all the evidence to determine the controverted questions as to whether (*a*) the machine in question was fit to perform the work for which it was bought, (*b*) whether it was of the best workmanship, (*c*) whether it was of the best material, (*d*) whether it had a capacity of bending soft steel of a thickness of three eighths of an inch, as per guaranty, (*e*) whether it in fact conformed to the

petitioner's specifications contained in the written agreement between the parties, (*f*) what the reasons for the defects and inferiorities were, (*g*) what caused one of the stanchions to crack, (*h*) what was the value of the machine before and after the break, (*i*) what were the damages which the respondent sustained; these are but a few of the vital issues which, it seems to counsel, required submission to the jury in both cases. In the statement of the cases which appears earlier in this brief, the evidence upon which the issues turn is condensed. It will be obvious to the Court from the record that practically every fact and opinion offered by either side was strenuously contested by the other side, and a vast amount of evidence, spoken, documentary, and specimens of the product of the machine, was put in by both sides.

Petitioner's brief, at page 27, refers to a discussion of these two assignments at page 52 of its brief. It appears that the petitioner's argument in support of these assignments is there confined to alleged errors relating to the complaints by the respondent concerning the machine, and not upon all the evidence. In its great zeal the petitioner has made these complaints the subject of specific assignments, and, pursuant to the plan of argument of the assignments originally outlined by the respondent, it will continue to argue them in their order.

30. The petitioner was not entitled to the requests referred to in this assignment.

(2) The Court is not required to rule upon the effect of portions of the evidence.

The request numbered (2) does not conform to the facts. The complaints concern the product of and service rendered by the machine, as well as the machine itself (Respondent's Specifications, R. pp. 8-10).

In the Court's charge the complaints were dealt with as follows: "The Smith Company keeps the machine. The Smith Company has not said the dies were improper; they

have said that the machine is no good and will not do the work that they [petitioner] promised it would do, and they say it was not worth the $5,000. that they spent on it."

(3) This request contains a statement which is equivalent to directed verdicts in both cases, to wit, ". . . The machine which Ohl delivered *in performance* of the contract between them. . . ." This request assumes that the machine was "delivered in performance of the contract." This was one of the very issues in the case. (Italics ours.)

The alleged acceptance was a mere memorandum given by one Hovasse, a mechanic employed by the respondent, who visited the petitioner's plant at Newark before delivery of the machine and before the memorandum of agreement was executed, to receive instructions in the operation of the machine. The purpose for which he was there, the extent of his authority, the circumstances under which he was induced to sign the alleged acceptance, and the so-called acceptance itself are set forth at R. pp. 58-61. It is obvious from the testimony at that point that he had no authority to bind the respondent, that he was imposed upon by representatives of the petitioner, and that the alleged test fell far short of the requirements of the express warranty.

At best the paper referred to was Hovasse's opinion; even if it went beyond that, the respondent is not precluded from recovery on the warranties. Accepting the petitioner's contention that the law of Massachusetts governs the parties, it is provided by the General Laws of Massachusetts that the right of the buyer to recover for breach of warranty survives acceptance if notice of complaint is seasonably given.

Mass. Gen. Laws, c. 106, sec. 49.
West End Co. v. *Warren Co.,* 198 Mass. 320.

Whether or not that right has been waived by any act of the buyer is a question for the jury upon all the evidence.

Borden v. *Fine,* 212 Mass. 425.

Herbrand v. *Lackawanna Steel Co.*, 280 F. 11 (C.C.A. 6th Circ.).

(4) Again, this request calls for a comment on the facts. The issues are clear. The Court said in the portion of its charge above quoted: "They [respondent] say it [the machine] was not worth the $5,000. that they spent for it." Later the Court says (R. p. 220) in effect that, if the machine would perform the work of bending these soft steel plates, "then your verdict must be for the Ohl Company for the full amount of what they are suing for." This seems to cover all that the petitioner would be entitled to on this phase of the issues. The respondent respectfully suggests that it, and not the petitioner, was harmed by this portion of the charge.

(5) The Court was not required to adopt this language. The language above quoted from the charge, it is submitted, was more favorable to the petitioner than was justified. The request is a virtual ruling of law which was clearly not warranted on the evidence.

(6) Again, the Court need not adopt the precise language of the request, even if the request called for an instruction of good law. But here, as in the previous requests, the petitioner asked the Court in effect to isolate that portion of the evidence relating to the question of consideration and rule upon it. This the Court was not required to do. To adopt the literal language of this request would leave the jury without proper understanding of its legal terms.

(7) Furthermore, the mere fact that the machine broke and thus became useless was sufficient to support the defense of failure of consideration. It required no warranty to support that defense. This is in reply to the petitioner's argument at page 73 of its brief.

The difficulty with the petitioner's argument is that it proceeds upon the hypothesis that the defense of failure of consideration is the equivalent of recoupment, and that fail-

ure of consideration must therefore be predicated upon breach of warranty. But according to the law of Massachusetts neither absence nor failure of consideration is equivalent to recoupment.

Jackman v. *Doland,* 116 Mass. 550.

It is further held in Massachusetts that mere non-fulfilment, in any respect, of a contract is a sufficient defense to a note given in consideration therefor.

Hawks v. *Truesdell,* 12 Allen, 564.

31. This assignment of error states an abstract proposition of law, which the Court was not required to give. Even if true, it conveys no information to the jury standing by itself.

32. This assignment of error seems to involve to some extent the same issues of fact and law as those which are involved in assignments of error numbered 26 and 27; and to avoid redundancy, the respondent is content to have the Court regard the argument with reference to the 26th and 27th assignments apply to this assignment. But in addition the respondent submits:

As to the 7th request, while the respondent has already pointed out that the plea of failure of consideration could not in law be said to be tantamount to recoupment, yet even if it were, the Court was not bound to adopt the literal request. Nor could it have served any useful purpose, because the jury would presumably have been unfamiliar with the significance of the legal terms employed in the request.

Respondent's views on the 8th and 9th requests are covered by its argument on the 26th and 27th requests.

33. (10) This is an erroneous statement, and if given in the form requested would be likely to confuse the jury. What the agreements between the parties were had to be determined upon all the evidence in the case and not by an

examination of certain exhibits. The identification of the subject-matter of the contract, its meaning, the blueprints submitted, and the conversations between the parties were all essential to a proper understanding of the agreements between the parties.

It is respectfully submitted that, in principle, the petitioner's position under this assignment is inconsistent with its position under assignment numbered 1, because the latter assignment would seem to be predicated upon the theory that the March 1st agreement was intended by the parties to cover their entire undertakings. This assignment seems to waive that position. The respondent agrees that the entire contract was not contained in the March 1st agreement and rider attached, but contends that the petitioner has not gone far enough in describing the evidence from which the same agreements must be adduced.

(11) This request was granted. See page 218 of the record.

(12) This is a vague statement. Exhibit 14, referred to in this assignment, is not set forth in the record. Even if it were, the request requires the jury to cull out that portion of said Exhibit 14 which deals with capacity without giving the jury any aid either in the evidence or from the Court as to how that process should be accomplished. There were, furthermore, other elements entering into the meaning and extent of "capacity." The Court instructed the jury on the capacity required of the machine (R. pp. 218-220). The Court was not bound to adopt the literal language of the request or subject the jury to the futile search which this request necessarily entailed.

34. (13 to 15) These requests are not accurate or complete characterizations of the specifications, certain portions of which are more fully set out in the foregoing statement of the cases. The true meaning of the term "bend" as used in the specifications was for the jury on all the evidence. The terms "bend" and "set" have been discussed

hereinbefore under assignment number 2 and Statement of the Cases, Part One.

(70) The judge refused this request because, as he said in his charge, "I don't personally get the idea of what you want to set steel for, or bend it rather, without setting. I don't quite see what that amounts to, but you are the arbiters of that. . . ." (R. p. 219).

The subject-matter of this assignment has been additionally discussed under assignment No. 2 and what has been said before under (70) as supplemented by the argument under assignment 2 applies equally to assignments numbered 71, 72, 73, 74, 75, and 76.

35. (16) The subject of this request was a matter for determination by the jury on all the evidence.

(17) This request is not accurate in that it does not set out the specifications in proper detail or accurately, nor their full effect. Furthermore, the general purposes of an agreement cannot be disregarded in interpreting its express terms.

(18) This request deals with a contention, and not with an interpretation of the alleged contract.

(19) This request presupposes that it satisfied the entire obligations of the petitioner. The respondent contends that it did not. Many of the subsidiary issues which were involved in the determination of the true obligations or the extent thereof were issues of fact. This position of the respondent has previously been argued, and, in the interest of expedition, the argument will not be repeated.

(63) This is a mere isolated, academic statement of law, and the judge was therefore not bound to give it.

(64) This assignment has been argued in substance (Assignment 2).

(68) The jury presumably understood the respondent's claims. It was not incumbent upon the judge to state them in this literal language. In fact, the language did not cover the respondent's claims as made.

(69) This assignment, in another form, has been discussed. The Court was not required to accept the language of the request; if it did, it would not have helped the jury.

36. The petitioner here pieces together portions of the charge in such a way as to present a picture which is entirely inconsistent with the charge when read as a whole. If so read, and in the light of the entire record, the charge is correct, and not harmful to the petitioner.

Amer. Ry. Express Co. v. *MacDermott*, 44 F. (2d) 955 (C.C.A. 3d Circ.).

The assignment is by no means set forth in the form in which the exceptions upon which it is based were noted (R. p. 222).

Ohl represented in addition that the machine ". . . will bend the heavy gauges of metal with ease and you can also bring out in *fine detail* multiple bends which cannot be successfully accomplished under the lighter machines of this class" (R. p. 48). (Italics ours.)

The evidence of the preliminary negotiations between the parties was not in dispute. Ohl held himself out as being skilled in manufacturing power presses, and Smith told him that he, Smith, required a press that would produce steel stairs and stringers. Ohl undertook to study Smith's needs and produce such a machine (R. pp. 14 to 17; 145).

On this and cumulative evidence of this kind, all of which was not in dispute, the sale having been made, it is submitted that the warranty of fitness could have been implied as matter of law.

But at frequent intervals throughout the charge the judge warned the jury that they were the final arbiters of the facts; and in finally summarizing the situation he said at R. p. 220: "Now it is up to you to say on this whole case in the first place, did the machine do or would the machine have done, if properly handled and operated the work in turning

or bending these soft steel plates? If you find that it would do that, then your verdict must be for the full amount of what they [petitioner] are suing for."

The respondent submits that the party really harmed by this expression of the law was the respondent itself, and not the petitioner.

37. (20) The subject of this request was a matter for determination by the jury on all the evidence.

(21) Professor Townsend of the Institute of Technology, an expert offered by the respondent, testified, in substance, that such machines as the one in question are commonly equipped with safety devices and that it was not proper construction to omit such a device from the machine in question (R. pp. 97 and 98). The express warranty of the petitioner distinctly stipulates that the machine is of the best workmanship and material and that it will bend soft steel of a thickness of three eighths of an inch. One of the stanchions of the machine broke while the professor was testing the machine. Mr. Perkins, a manufacturer of this class of presses, testified in effect that unless a press of the kind contemplated by the parties in this case had a factor of safety of 6 to 1 it should be equipped with a safety device; and "that the machine was far below in factor of safety to properly do the ⅜ by 12 foot sections it was designed or guaranteed to do" (R. pp. 111, 112, 113). Mr. Ohl testified that if the friction clutch on the machine was not properly adjusted, the machine would break and that that clutch constituted a safety device (R. p. 148). Moreover, it is respectfully submitted that it was not incumbent upon the Court to adopt the specific language or interpret a detached part of the agreement or to give the jury such a negative instruction as the petitioner, in this instance, requested.

(22) As to the contents of the express warranty, it speaks for itself. As to the effect of the express warranty with respect to whether it involved the necessity for a safety device, Professor Townsend testified that in constructing such

a machine, to prevent a rupture of some vital part, some sort of safety device ought to be installed, and that otherwise it would be improper construction (R. p. 98). Mr. Ohl said this friction clutch is a safety device (R. p. 148).

(23) This request is ambiguous. If the word "design" is to be taken as synonymous with "object" or "purpose," the subject-matter of it ought to be left for determination by the jury. Furthermore, the entire tenor of the warranty is not set forth in this request (R. p. 11). It is submitted that the Court is not required to single out a specific phase of the warranty and make specific comments on it as this request would seem to require.

(23a) This request clearly contains an incorrect statement of the warranty; the capacity as called for by the request is insufficiently stated. The comments already made as to the previous request, 23, dealt with under this assignment, would seem to be equally applicable to this. This assignment is predicated upon a request which, as submitted to the Court, describes the thickness of soft steel referred to as 3/6 and not 3/8 as described in the assignment.

(24) This request begs one of the principal questions in the case. There is no evidence of operation in excess of the capacity of the machine. The Court is not required to assume as a fact that the machine had the "capacity called for." That is one of the very decisive questions which had to be submitted to the jury for determination.

38. The very language of this request implies that the point raised by it is to be left to the jury; and it was, in fact, so left.

39. (25) Specifications are not available as evidence. Even if they were, the respondent submits that the Court is not required to state a fragmentary specification any more than if it were a detached portion of the evidence.

Hanley v. *Eastern Steamship Co.*, 221 Mass. 125, 135.

(26) The respondent submits that the Court is not required to single out a fact and state the same to the jury in its charge, even though that fact, standing by itself, be not controverted. The jury is presumed to have it in mind.

Hanley v. *Eastern Steamship Co., supra.*

(27) Mr. Smith's "actual knowledge" of the defects of the machine are matters for determination by the jury and not by the Court. Moreover, what is "fairly within the scope of specifications 3A to E inclusive" is clearly for the jury to determine.

Powers v. *Bergman,* 197 Mass. 39, 41.

(62) Among other objections to this request would seem to be its generality. Besides, it does not appear that the specifications cover all claims of the respondent; they are merely the particulars called for by the petitioner's motion for specifications.

McDonough v. *Boston Elevated Ry. Co.,* 208 Mass. 436.

40. (65) It is assumed by the respondent that the petitioner is restricted in the matter of assignments of error to the exceptions or rulings upon which they are based, and that such descriptive matter as is contained in paragraph 40 (R. p. 257) is not germane to the assignments. The actual requests upon which assignments 65, 66, and 67 are predicated make no reference whatsoever to Gen. Laws, c. 106, sec. 38.

As was said with reference to previous requests, it was not incumbent upon the Court to state to the jury any of the facts, and particularly a fragmentary or detached portion of the evidence. Whether "the lack of any safety device other than the 25-inch diameter friction clutch was or was not apparent to Smith at the time the machine was delivered and assembled before April 15th, 1926," was clearly

a matter for the jury on all the evidence. The machine was not only massive, but extremely intricate, as the evidence related in the bill of exceptions and exhibits will show; the respondent company, as the evidence will show, was not in the business of dealing in machinery, but used it as an incident to the fabrication and erection of steel.

(66) It is respectfully submitted that there was no occasion for a notice to the effect that the machine did not contain a safety device "other than such friction clutch" prior to Exhibit 20 of November 22, 1926. It would seem to be sufficient notice that the clutch was not effective (contrary to the testimony of Mr. Ohl above referred to). Moreover, it is not incumbent upon the Court to point out the omission of an isolated fact, particularly where such omission could not be decisive of the whole case.

Trimount Lumber Co. v. *Murdough,* 229 Mass. 254, 255.

(67) It was one of the contentions of the respondent that the press was defective in that it lacked a proper safety device; the petitioner challenged this contention and claimed that the 25-inch diameter friction clutch supplied that requirement and acted as a proper safety device. Thus an issue was made with reference to this particular complaint. It was therefore not incumbent upon the Court to instruct the jury in accordance with request No. 67; and furthermore, it is assumed that the damage sustained by the respondent was not for any given defect, but to the whole machine as it might be affected by such defects as the jury found to exist.

41. (28) It was not incumbent upon the Court to point out the isolated fact asked for in this request.

The respondent desires to make the same comment upon paragraph 41 (R. p. 257), which was just made with reference to paragraph 40 on that page.

(29) This request calls upon the Court to state an abstract proposition of law. The mere acceptance of this machine would not prevent the respondent from recovery for breach of warranty.

General Laws of Mass. c. 106, sec. 49.

(30) The Court was not required to state this abstract proposition of law. In effect the Court granted this request, since it granted request for ruling No. 31 filed by George A. Ohl Company (R. pp. 214, 218).

(33) It is submitted that this request was improper for the reason that it fails to state the circumstances preceding and attending the giving of the notice therein referred to, such as: The respondent company was a fabricator of steel and had had no experience with this class of machine until it was installed in the respondent's plant (R. pp 15-18). The respondent's employee, Hovasse, had been sent over to the petitioner's factory to acquaint himself with the operation of the machine in February of 1926; he had never seen such a machine before (R. p. 70). The tests made at Newark when Hovasse was there were not at a 90° angle; the steel that was used was copper backed (R. pp. 82-83); Mr. Ohl of the petitioner company testified that during the instructions which were given Hovasse at the petitioner's factory no ⅜" steel was operated upon and no 3" dies were used and no 12-foot lengths were applied to the machine (R. pp. 163-164). Ohl further admitted that he suggested to Hovasse the use of a 2" die; at Ohl's plant during the instructions the power unit was not installed—instead a temporary motor was being used (R. p. 70); he then noticed that he could not move the shaft; he took the bearing out and found it "kind of bound" in places and succeeded in fixing it so that it would turn, and then cleaned the shaft and put the assembly back (R. p. 72); nothing more was done on that day; no dies were set until three days thereafter (R. p. 73); at the time that the trouble occurred with the shaft, Hovasse

knew nothing of the peculiarities of the iron (R. p. 74); no stringer stock was bent until August or September of that year (R. p. 91). The petitioner's operator did not notice anything out of the ordinary outside of a lot of deflection on short pieces, like risers; it did not seem to do any harm but it did heat some (R. p. 85). The adjustment was by "trial and error" (R. p. 149).

(34) This request is too vague to be of any value to the jury, and the Court was warranted in refusing it.

(39) This request is not in accordance with the fact. The respondent sent a notice of defect on August 13, 1926, which fact was not in dispute (Exhibit EE, R. p. 31).

(40) This request was erroneous, since the subject-matter of this request was properly for the jury's determination.

(41) The Court was not required to grant this request either in substance or in its literal terms. The motion for specification No. 3 called upon the respondent to furnish the petitioner particulars as to unsatisfactory service from the outset (R. p. 234). In the answer thereto the petitioner adopts the language of the motion and sets forth those things which occurred then and thereafter. The respondent set forth five particulars in its answer to paragraph 3, but did not specify that all these defects occurred on April 15, 1926, as the petitioner now attempts to interpret this specification. The petitioner made no such contention at the trial, and evidence was introduced by it showing the times when the respondent observed these successive defects. The petitioner therefore cannot, for the first time after the verdict, assert a grievance based upon alleged departures from the specification.

Turner v. *Twing,* 9 Cush. 512, 514, 515.

(42) The Court, pursuant to the petitioner's request No. 31, ruled on the timeliness of notice. It is submitted that request No. 42 was improper for the reason that it fails to state the circumstances preceding and attending the

giving of the notice therein referred to, such as: After the letter of June 25th from the respondent to the petitioner the latter replied suggesting merely that the respondent use more oil (Exhibit DD, R. p. 31); in the meantime no heavy work was as yet being bent by the respondent; it was confining itself to small pieces, such as stairs and treads, but the heating seemed to continue; the machine was allowed to cool at intervals; on August 13th, the respondent wrote another letter complaining of the machine, and on August 16th the petitioner wrote its then attorney in Boston enclosing copies of the June 25th letter and the reply thereto of June 28th (Exhibit KKK, R. p. 92), as a result of which the Boston Engineering Company was retained by the petitioner to take down a portion of the machine, and then it appeared for the first time that a blow-hole existed in the casting "where the 16" bushing goes in" (R. p. 63); it also then appeared that part of the brake was broken and that two blow-holes showed at the fractures in the brake (R. p. 63); some heavy work, such as 6-foot lengths, was begun in July, and began to show center deflection (R. p. 63).

(43) This request is too vague to be of any value to the jury, and the Court was warranted in refusing it.

(44) The respondent's argument under assignment 41 is equally applicable to this assignment.

(45) The Court would be warranted in refusing to give request No. 45, because of its uncertainty and vagueness. It does not appear what notice is referred to.

(46) The Court is not required to instruct the jury as to an isolated portion of the evidence.

(47) The argument made by the respondent under assignments (41) and (42), just above, are equally applicable to this assignment.

(48) This is not a correct statement of Smith's evidence. Besides, it is not incumbent upon the Court to select a portion of the evidence and repeat it to the jury even if it is uncontroverted.

(49) The argument made by the respondent under assignments (41) and (42) above is equally applicable to this assignment.

(52) The respondent submits that the judge was not required to give request No. 52. The knowledge the respondent had or was charged with was a matter that was peculiarly within the province of the jury. Moreover, the petitioner seeks first to obtain a ruling of law that one specification is within the scope of another specification and then that both of the specifications are within the knowledge of the respondent. Obviously, this is not a proper subject for a request to charge the jury.

(55) It is submitted that this request was improper for the reason that it fails to state the circumstances preceding and attending the giving of the notice therein referred to. The respondent has heretofore, under assignments (33) and (42), set forth as briefly as possible the successive experiences that the respondent had with the machine in question. As has been previously stated, the heavy work, such as stringers, was not bent until some months after the machine arrived, approximately July of 1926 (R. pp. 63, 86). Then the bowing began to appear. Thereafter a Mr. Kolarsy, superintendent of the petitioner company, arrived in Boston, to wit, on or about September 1st; it was on that occasion that an inspection of the machine was made by Kolarsy, who came five days after a letter from the respondent to the petitioner (Exhibit JJ, R. p. 37), in which it was suggested that the petitioner send its manager, that the machine would be down Thursday and Friday, and containing the suggestion: "don't form conclusions—seeing is believing." It was on this occasion that the oral notice referred to in the request now under discussion was given (R. p. 14).

(58) The respondent submits that this request was erroneous and that the Court was not obliged to single out isolated facts to be considered by the jury.

(59) This request is not in accordance with the evidence. It appeared from the testimony of Mr. Smith that up to June 25, 1926, the petitioner had not tried any ⅜" steel bending (R. p. 31), and that the "bowing was not called to Smith's attention until several months had elapsed" (R. pp. 56, 57). Furthermore, this request is invalid because it depends upon a conjecture as to what the jury would find the defect was due to. It is, moreover, vague.

(60) In view of the erroneous nature of request No. 59, request No. 60 could not, of course, be granted. In addition this request called for isolation of particular facts, and it is submitted that the Court is not required to segregate facts in the form requested by a party.

42. The petitioner, having requested the Court to rule upon this question, as matter of law, cannot now complain that the judge acceded to its request, after the judge made a finding adverse to its contentions. The respondent submits that the Court's finding was clearly correct.

Barrett Co. v. *Panther Rubber Co.*, 24 F. (2d) 329, 336.

Gascoigne v. *Cary Brick Co.*, 217 Mass. 302, 305.

Taylor v. *Cole*, 111 Mass. 363.

Trimount Lumber Co. v. *Murdough*, 229 Mass. 254.

Nashua River Paper Co. v. *Lindsay*, 242 Mass. 206.

It is submitted that the Court saw the parties, photographs of the machine, exhibits, and correspondence, and exercised his judgment properly in determining the reasonableness of notice. There is nothing in the record which requires a different conclusion from that reached by the Court upon a consideration of the evidence before it. The respondent respectfully refers to its Statement of Facts, Part One of this brief, setting forth briefly the nature of the correspondence and controversy between the parties.

Moreover, the petitioner made no complaint in its letters or through its representatives who called at the respondent's plant and made no objection that the respondent was dilatory in the giving of its various notices or any of them; much, if not all, that the respondent complained about was either known to the petitioner as existing evils in the machine or was, according to some of its own letters, inferred by it.

See *Rittenhouse W. Auto Co.* v. *Kissner,* 129 Md. 102; 98 Atl. 361.

The petitioner suffered no harm or prejudice by reason of the intervals that elapsed, and there was no showing of any change in the situation between the parties or in the condition of the machine by reason thereof other than what would follow from the normal developments. The petitioner showed no great anxiety or solicitude even after the receipt of the first notice by it. It was not until the respondent threatened to refer the matter to its counsel that the petitioner became solicitous (Exhibit EE, R. p. 31).

The respondent should not be reproached for endeavoring to do such minor things as might enable it to operate the machine before rushing to complain the very moment its first difficulty was encountered.

The indifference of the petitioner is indicated by its correspondence and its assurances that there was nothing the matter with the machine, other than lack of oil and operation by an "automobile mechanic"; such trifling references reflect against the petitioner—not against the respondent.

Sturm v. *Williams Oven Mfg. Co.* (1922), 201 App. Div. 113; 193 N.Y. S. 852.

43. It would seem to be clear that, if the Court adopted this request, and even if the law stated in it was proper, it would merely be stating an abstract proposition of law which would, presumably, be meaningless to the jury and

the literal language of which the Court would not be required to adopt.

44. (35) The law of Massachusetts, as the respondent understands it, is that a notice under the Sales Act need not specify particular defects. A general claim of damage is sufficient.

Trimount Lumber Co. v. *Murdough,* 229 Mass. 254, 256.

All the notices, except one, were by mail and are set forth verbatim in the record. The exception referred to was an oral notice given to the petitioner's representative, Mr. Kolarsy, when he called at the respondent's plant on September 1, 1926 (R. p. 67).

(36) While respondent's letter, Exhibit CC, does erroneously refer to the "fly wheel bearings" when it should have said "fly wheel shaft," the petitioner's reply, Exhibit DD (R. p. 31), clearly indicates that the petitioner recognized the error by saying: "Any machinist should be able to take down the *fly wheel shaft* etc." Again, at page 82 of the record, it appears that the bearings referred to are mounted upon the shaft referred to, and that from Exhibit DD the respondent learned that the petitioner understood the true location (R. pp. 82, 83). Under these circumstances it is submitted this request was properly refused.

The petitioner now impliedly admits that this error was purely inadvertent and did not mislead the petitioner (Petitioner's Brief, p. 58).

(37) What has been said with reference to No. 36 seems to be equally applicable to this request; but, moreover, it is submitted that whether the notice satisfied "the requirements of the Sales Acts as to notice" would have meant very little to the jury and need not have been adopted by the Court.

(38) What has been said of Nos. 35 and 37 with reference to the duty of the Court seems to be equally true of

No. 38. It is interesting to note that in this assignment the petitioner records the next notice after June 25th as being that of August 13th (R. p. 260), whereas, in its assignment 39 (R. p. 238), the petitioner states that the next notice after June 25th is that of August 23d.

(50) Again, the petitioner is in obvious error since the next notice which the petitioner itself asserts is August 23d, a written notice (Exhibit II, R. p. 35).

(51) Any fault which the petitioner had to find with the specifications should have been called to the Court's attention before the verdict.

(56) In so far as this is a mere statement of a fact, the Court is not required to state it to the jury; in so far as it imports a specification, it is not a matter upon which the Court is required to comment.

(57) Nor is the Court required, as matter of law, to instruct the jury that the notice of September 3d, or any other notice previously given, did or did not "satisfy the statute as to notice."

As has been pointed out, the law does not require that the notice contain specific defects.

> *Trimount Lumber Co.* v. *Murdough,* 229 Mass. 254, 255.

45. The judge need not refer to all facts if he informs the jury, as the judge in this case did, that all issues of fact are to be determined by them. Furthermore, Ohl admitted (R. p. 171) that the foundation constructed for the machine by the Smith Company was proper.

46. It is obvious that this question was for the jury. The respondent respectfully refers to its Statement of Facts. If anything, this instruction would seem to be quite favorable to the petitioner.

48. In substance the Court left it to the jury to say on all the evidence what the machine in question was worth before the break, assuming that it would not do the work for which

it was purchased, and merely indicated in a general way parts of the evidence which might aid the jury in coming to their conclusion. It was, of course, essential for the jury in assessing damages to fix in their minds the value of the machine before and after the break. In fairness to the Court, other portions of the charge should be read in conjunction with this paragraph.

The last sentence under assignment 48 is an obvious misquotation from the judge's charge at R. p. 218. It gives the impression that the thought intended to be expressed by the sentence ending ". . . what is it" carries over to the next sentence, which is palpably wrong (R. p. 220). This situation is similar to that appearing under assignment 36 (R. p. 255). Neither of these assignments is predicated in precise form upon a corresponding exception to the charge; see R. p. 221, to R. p. 223, which contains all of the specific exceptions to the charge.

49. So far as the first sentence opening with the word "may" and ending with the word "machine" is concerned, this instruction is necessarily predicated upon the condition stated in the preceding paragraph of the charge, to wit: "if, on the other hand, you find the machine would not do it [the work intended]"; thus read it would seem that those items of expense, if the jury arrived at the question of damages, would be properly allowable. The remaining sentence in the portion of the charge set forth in assignment 49, read in conjunction with the same predicate, would seem to be a proper element of damage. This relates to the repairs which the respondent made after the break and for the purpose of preventing further breakage and using the machine in the limited way to which the break and the repairs confined it. This item is specifically alleged in the plaintiff's declaration as an element of damage (R. p. 230).

50. The Court's charge was proper and left the issues of fact to the jury. The issues in the case at its end became extremely simple. Prolix requests of the number and kind

presented by the petitioner, setting forth inaccurate statements of fact, singling out portions of the testimony, and presenting abstract questions of law, have a tendency to confuse rather than aid the jury. It is submitted that the jury had all the facts before it, and it must be presumed that they remembered and understood the testimony, and it was not necessary for their clear comprehension of the case to go any further than the judge went in this cause.

This assignment of error is clearly an objection to the charge as a whole, and therefore invalid.

51. The respondent respectfully refers to the argument under assignment of error 50.

52. The respondent respectfully refers to its argument previously made in 50 and 51 under various assignments of error, and asserts that this assignment is invalid because it is an objection to the charge as a whole.

53. The Court specifically charged the jury: ". . . if you find that it would do that, then your verdict must be for the Ohl Company for the full amount of what they are suing for" (R. p. 220).

54. In so far as the motions for a new trial are predicated upon the alleged intention of two jurymen with respect to the verdicts, they depend exclusively upon a mere private conversation between said jurymen and petitioner's counsel (R. p. 226). The denial of said motions for new trial was, in all respects, within the discretion of the judge.

Damages.

In Massachusetts the question of whether a contract is entire or separable is one of intention. Where, as in the case at bar, several articles are included in one sale at one all-inclusive price which is paid or to be paid without regard to apportionment, it is ordinarily an entirety.

Barlow Mfg. Co. v. *Stone,* 200 Mass. 158, 160, cases cited.

The statement by the judge with reference to the dies could not have meant what the petitioner attributes to it at pages 78, 79, of its brief. If the petitioner believes it did, it is itself inconsistent, because obviously the payments by the respondent aggregating $5000 were on account of the *total* purchase price, including the dies; and the action of the petitioner was for the unpaid notes which also contemplated the total purchase price without apportionment.

There was not a shred of evidence of the *value* of the dies, one way or the other. What the petitioner probably refers to are estimates of costs of dies (Exhibit F, R. p. 19). Respondent's letter (R. p. 20) orders the dies and says: "It is of course important that these dies be shipped at the same time with the machine . . ." Then follows more correspondence and, ultimately, the Memorandum of Agreement (R. pp. 11-12), which includes the dies, the machine, and sundries "for the sum of $12009.68," being the total price without any indication of separation or allocation.

So that the respondent submits that its analysis of the verdicts is in accord with the law as well as the evidence.

Conclusion of This Branch of the Case.

St. Feb. 26, 1919, c. 48 (Judicial Code, sec. 269, as amended), provides:

> "All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any cases, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The respondent respectfully submits that on the whole record now before the Court there was no error committed at the trial; or, if there was, it was so harmless as not to have affected the substantial rights of the petitioner.

Gilmer v. *Higley*, 110 U.S. 47.
Vicksburg &c. Rd. v. *O'Brien*, 119 U.S. 99, 109.
Grimes v. *Malcolm*, 164 U.S. 483, 492.
Kalanianole v. *Smithies*, 226 U.S. 463.
Seaboard Railway v. *Moore*, 228 U.S. 433.
Pennsylvania R.R. Co. v. *Olivit Bros.*, 243 U.S. 574, 585.
Horning v. *District of Columbia*, 254 U.S. 135.
Rumsey v. *N.Y. Life Ins. Co.*, 267 F. 554 (C.C.A. 9th Circ.).
Rosen v. *United States*, 271 F. 651 (C.C.A. 2d Circ.).
United States v. *Penn. R.R. Co.*, 283 F. 937 (C.C.A. 4th Circ.).
Robilio v. *United States*, 291 F. 975 (C.C.A. 6th Circ.).
Blakeslee v. *United States*, 32 F. (2d) 15.
Redmond v. *United States*, 8 F. (2d) 24.
Brown v. *Carver*, 45 F. (2d) 673 (C.C.A. 2d Circ.).

Wherefore the respondent respectfully submits that under either branch of the case writs of certiorari should not issue.

Respectfully submitted,

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